No. 13120

United States
Court of Appeals
for the Ninth Circuit.

TODD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ROBERT W. FULWIDER,
5225 Wilshire Blvd.,
Los Angeles 36, Calif.

For Appellee:

HUEBNER, BEEHLER, WORREL & HERZIG,

HERBERT A. HUEBNER,

ALBERT M. HERZIG,

610 S. Broadway,
Los Angeles 14, Calif.

In the United States District Court, Southern District of California, Southern Division

No. 5566-Y Civil

JOHN T. GIBBS,

Plaintiff,

vs.

TODD C. FAULKNER, Doing Business Under the Fictitious Name of FAWN,

Defendant.

ADDITIONAL FINDINGS OF FACT ON ISSUE OF DAMAGES AND ATTORNEYS' FEES

I.

Prior to the commencement of this suit, plaintiff John T. Gibbs had executed license agreements with several licensees, empowering them to use the game of the patent in suit No. 1,906,260, upon condition that they procure the required number of game apparatus from Gibbs, and pay him an annual royalty of Three Thousand ($3,000.00) Dollars. Such annual royalty prevailed in the case of locations which by reason of geographical situation and population could operate at least several months of the year. Certain other license agreements provided for a lesser royalty in small locations which could only operate during brief summer periods. From the game apparatus placed with these licensees, Gibbs derived a net profit of approximately One Hundred and Fifty ($150.00) Dollars per unit

apart from the annual royalty. [2*] Various other licenses were outstanding, but because of special circumstances which caused them to be entered into they, with one exception, do not provide a standard pattern for the purpose of determining damages herein.

II.

The exception referred to is a license from Gibbs to one Loof, et al., doing business as Skill Games, the term of which was partially contemporary with the infringing operations of defendant Todd C. Faulkner. Shortly prior to the commencement of this action, the plaintiff Gibbs entered into said license agreement with Loof, et al., for a location in Long Beach, California, on the Pike in the general neighborhood of the infringing operation conducted by the defendant Faulkner. The licensee therein paid to plaintiff Gibbs, or for his benefit, the total sum of Twenty-four Thousand, Five Hundred ($24,500.00) Dollars during the time the license was in effect, namely from July 25, 1946, to May 1, 1950. Of this total sum Ten Thousand ($10,000.00) Dollars was diverted to legal expenses applied primarily to the conduct of this suit. The Long Beach location of the licensee was a twelve months operation and the Long Beach operation of the defendant Faulkner was a twelve months operation. Among other provisions, it was specifically provided in said agreement that the licensee pay the plaintiff Gibbs an annual royalty of Three Thousand Dollars ($3,000.00) for the years 1948 and 1949.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

III.

In addition to the Ten Thousand ($10,000.00) Dollars paid by the licensee Loof for Gibbs account on litigation, Gibbs paid approximately Eleven Thousand Three Hundred ($11,300.00) Dollars toward the cost of litigation up to and including January 6, 1950, making a total amount paid by or for Gibbs of Twenty-one Thousand, Three Hundred ($21,300.00) Dollars, most of which amount was directly connected with the prosecution of [3] the present suit. Defendant does not question that this amount represents a fair actual cost for the services rendered and disbursements made on behalf of plaintiff. Since January 6, 1950, plaintiff Gibbs has incurred legal expenses in connection with the issue of damages for his attorneys' services in investigating the defendant's operations, taking depositions on the subject of damages, moving before this Court for an assessment of damages, preparing for hearing on the same and conducting a hearing before this Court on May 28, 1951.

IV.

The defendant Faulkner caused to be manufactured and operated on the Pike in the city of Long Beach, California, one bank of sixteen infringing game units from July, 1944, to December, 1949, and a second bank of sixteen infringing game units from August, 1944, to December, 1949, with the exception that one of said banks of sixteen units was operated for a few months by the defendant in the city of Compton, California. The use was

continuous and normally from 12 noon every day to 11 p.m. Each unit accommodated one player, and the charge per game varied from ten cents to twenty cents per player. Approximately thirty-five (35) games per hour were normally played.

V.

Evidence shows that the defendant's operation had a physical capacity for a gross income of several hundred thousand dollars per year. The defendant asserts, on the other hand, that he did not realize such an income and he claims to have obtained a total profit for the infringing operation of approximately only Sixteen Thousand ($16,000.00) Dollars. The defendant, however, is relying upon information furnished him by employees, and no books or records supporting his contention were produced before this Court, nor were the employees called as witnesses. [4] Inasmuch as the defendant caused the infringing machines to be manufactured, the plaintiff Gibbs derived no profit from such manufacture and installation and sustained damages thereby and from loss of royalties on the infringing use.

VI.

The Court finds that a reasonable royalty to be paid by defendant to plaintiff Gibbs for infringment of his Letters Patent as hereinbefore found, would be the amount of average royalty paid by several licensees to Gibbs under the license agreements referred to in paragraph I of these findings, and also the amount of average royalty paid by

licensee Loof for the years 1948 and 1949, namely, Three Thousand ($3,000.00) Dollars per year. Therefore, the Court finds that plaintiff Gibbs has been damaged in this action by reason of infringement of his Letters Patent by defendant, in the sum of Fifteen Thousand ($15,000.00) Dollars, which amount is predicated on five years' operation of the infringing machines, giving the defendant the benefit of an additional free period of operation and basing no damage on loss of profits from the manufacture of the machines.

VII.

The Court in its Interlocutory Judgment allowed the plaintiff the sum of Five Hundred ($500.00) Dollars as reasonable attorneys' fees, and the court now finds that the further sum of One Thousand ($1,000.00) Dollars should be allowed as additional attorneys' fees, which sum is reasonable and nominal in view of the nature and extent of the litigation.

VIII.

Costs previously taxed and allowed in favor of the plaintiff in the Interlocutory Judgment amounted to Five Hundred Twenty-two and 63/100 ($522.63) Dollars. Plaintiff has necessarily incurred as taxable costs in the prosecution of this action in this Court since affirmance of the interlocutory decree [5] the sum of....., as shown by bill of costs filed herein; which, in addition to the damages and attorneys' fees, the Court finds should be taxed as costs in this action.

Conclusions of Law

I.

Judgment should be entered herein in favor of plaintiff Gibbs and against defendant Faulkner in the sum of Fifteen Thousand ($15,000.00) Dollars damages, Fifteen Hundred ($1500.00) Dollars attorneys' fees, costs in the sum of Five Hundred Twenty-two and 63/100 ($522.63) Dollars and.... ..... (to be taxed) for all of which let execution issue.

/s/ LEON R. YANKWICH,

Dated at Los Angeles, California, this 15th day of June, 1951.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 15, 1951. [6]

In the United States District Court, Southern District of California, Southern Division

No. 5566-Y Civil

JOHN T. GIBBS,

Plaintiff,

vs.

TODD C. FAULKNER, Doing Business Under the Fictitious Name of FAWN,

Defendant.

FINAL JUDGMENT

This cause came on to be heard before the Court on oral testimony and documentary evidence and physical exhibits received, and was argued by counsel and an Interlocutory Judgment entered; thereafter, on appeal to the United States Court of Appeals for the Ninth Circuit, said Judgment was affirmed; thereafter, upon the granting of a writ of certiorari by the Supreme Court of the United States, and a Hearing in said Supreme Court, the Judgment of the Court of Appeals was affirmed; thereafter, this Court, having heard the parties on the question of discharge of the Special Master appointed to report as to damages, and having itself conducted a hearing and received evidence on the subject of damages and additional attorneys' fees, it is hereby [7]

Ordered, Adjudged and Decreed

I.

That United States Letters Patent No. 1,906,260

issued May 2, 1933, for a game to John T. Gibbs was good and valid in law to the date of its expiration as to claims 3, 6, 7, 8, 9, and 10, and that the title of said patent has always been vested in plaintiff.

II.

That the defendant Todd C. Faulkner infringed claims 3, 6, 7, 8, 9 and 10 by making and using the original Fawn game described and illustrated in plaintiff's Exhibit 2.

III.

That the defendant Todd C. Faulkner infringed claims 3, 9 and 10 of said Letters Patent No. 1,906,260 by making and using the altered Fawn game, said alteration being illustrated in plaintiff's Exhibit 9.

IV.

That the plaintiff John T. Gibbs recover from the defendant Todd C. Faulkner damages arising out of and accruing by the infringement by defendant in the sum of Fifteen Thousand ($15,000.00) Dollars.

V.

That the appointment of Honorable David B. Head as Master to ascertain and take and report to the Court an accounting of said damages and to affix the same is set aside; and the Court fixes the compensation for the services of said Master at One Hundred and Fifty ($150.00) Dollars, and the defendant Todd C. Faulkner having paid the same, it is hereby approved.

VI.

That defendant's counterclaim is dismissed upon the merits and with prejudice. [8]

VII.

That plaintiff recover from defendant Todd C. Faulkner his costs and disbursements of the suit since the affirmance of the Interlocutory Judgment, to be taxed by the Clerk in the amount of One Hundred Forty-three and 90/100 ($143.90), to be added to costs previously taxed in the sum of Five Hundred and Twenty-two and 63/100 ($522.63) Dollars.

VIII.

That plaintiff recover from defendant Todd C. Faulkner reasonable attorneys' fees in the sum of One Thousand ($1,000.00) Dollars to be added to reasonable attorneys' fees in the sum of Five Hundred ($500.00) Dollars previously adjudged.

IX.

That plaintiff have execution for such damages, costs and attorneys' fees.

X.

The patent having expired, the injunction is discontinued.

Witness the Honorable Leon R. Yankwich, Judge of the United States District Court, Southern Dis-

trict of California, Southern Division, this 15th day of June, 1951.

/s/ LEON R. YANKWICH,
Judge.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 15, 1951.

Entered June 15, 1951. [9]

[Title of District Court and Cause.]

NOTICE OF APPEAL UNDER RULE 73

Notice is hereby given that Todd C. Faulkner, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 15, 1951, and particularly paragraphs IV, VII, VIII and IX thereof.

/s/ ROBERT W. FULWIDER,
Attorney for Appellant
Todd C. Faulkner.

RWF/bdj

[Endorsed]: Filed July 14, 1951. [10]

[Title of District Court and Cause.]

CASH DEPOSIT IN LIEU OF COST BOND ON APPEAL

To the Clerk of the United States District Court, Southern District of California, Central Division:

Whereas, on June 15, 1951, judgment against the defendant Todd C. Faulkner was entered in the above-entitled case and said defendant has filed a notice of appeal from said judgment.

Now, Therefore, pursuant to local Rule 8(e) of the above-entitled court, we deposit with you herewith the sum of Two Hundred and Fifty ($250.00) Dollars cash, of which said defendant Todd C. Faulkner is the owner, said money to be held and disbursed by you as security for costs on appeal as follows, to wit:

The condition upon which said deposit is made is that if the said Todd C. Faulkner shall prosecute his appeal with effect and pay all costs if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then said deposit shall be returned to him, otherwise to be applied by you [11] to pay such costs, and the balance if any returned to him.

Said defendant agrees by and through his undersigned attorney that in case of default or contumacy on defendant's part, the court may upon notice to him of not less than ten (10) days proceed summarily and render judgment against him in accord-

ance with his obligation above recited and award execution thereon.

/s/ ROBERT W. FULWIDER,
Attorney for the Defendant-Appellant Todd C. Faulkner.

State of California,
County of Los Angeles—ss.

On this 13th day of July, 1951, before me, Betty Daxon, a Notary Public in and for said County and State, personally appeared Robert W. Fulwider, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ BETTY DAXON,
Notary Public in and for Said County and State.

My Commission expires Sept. 25, 1953.

RWF/bdj

[Endorsed]: Filed July 14, 1951. [12]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING APPEAL AND FILING RECORD THEREON

The Defendant-Appellant, Todd C. Faulkner, having on July 14, 1951, filed his Notice of Appeal and on September 10, 1951, his designation of record on appeal in the above-entitled action and having made application to this Court for an extension of time in which to docket said appeal and file the record thereon, and the Court being advised in the premises, and good cause appearing therefor:

It Is Hereby Ordered that the time in which said Defendant-Appellant, Todd C. Faulkner, may docket his appeal in this cause and file his record on appeal with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby extended to and including October 10, 1951.

Dated at Los Angeles, California, this 24th day of September, 1951.

/s/ BEN HARRISON,
Judge of the United States District Court for the Southern District of California.

Presented by:

/s/ ROBERT W. FULWIDER,
Attorney for
Defendant-Appellant.

[Endorsed]: Filed September 24, 1951. [18]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It is stipulated between the parties, through their respective counsel, that the transcript of the proceedings of May 28, 1951, designated by the defendant-appellant, is to be corrected as follows:

Page 8, line 22, change "attainment" to —payment—.

Page 9, Line 4, after "Looff" insert —(skill games)—.

Page 14, Line 21, change "agree" to—argue—.

Page 15, Line 2, change "reasonable royalties" to —attorneys' fees—.

It is further stipulated that this stipulation is hereby designated and shall become a portion of the record in the instant Appeal.

Dated at Los Angeles, California, this 26th day of September, 1951.

HUEBNER, BEEHLER,
WORREL & HERZIG,

By /s/ ALBERT M. HERZIG,
Attorneys for Plaintiff.

/s/ ROBERT W. FULWIDER,
Attorney for
Defendant-Appelant.

Order

It is so ordered. Date: September 26, 1951.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed September 26, 1951. [16]

In the United States District Court, Southern District of California, Central Division

No. 5566-Y Civil

Honorable Leon R. Yankwich, Judge Presiding.

JOHN T. GIBBS,

Plaintiff,

vs.

TODD C. FAULKNER, Doing Business Under the Fictitious Name of FAWN,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

HUEBNER, BEEHLER, WORREL & HERZIG, by

HERBERT A. HUEBNER, Esq., and

WARREN T. JESSUP, Esq.

For the Defendant:

ROBERT W. FULWIDER, Esq.

May 28, 1951. 2:00 P.M.

The Clerk: No. 5566-Y, Gibbs v. Faulkner.

Mr. Huebner: Your Honor, this matter is before you on three subjects. The first is the discharge of David B. Head, as special master, and the fixing of his compensation. That has been hanging a long time, and no disposition was ever brought to your Honor's attention. The second is to ask your Honor to assess damages for the infringement, and the third is to consider some additional allowance as attorneys' fees which have accrued since the date of the interlocutory judgment.

Now, in order to save your Honor's time in the hearing this afternoon we took the deposition of Mr. Gibbs. He is present in court, but we have here his deposition, and I should like at this time to file it, together with the original paper exhibits which accompany the deposition.

The Court: All right.

Mr. Huebner: I will summarize or point out, with your permission, the highlights that we want to bring to your Honor's attention.

Mr. Fulwider: Might I say, your Honor, that there are numerous parts of the deposition which I think could be objected to, but in the interests of co-operating with Mr. Huebner, I will waive those objections as to materiality, with [2*] the opportunity, of course, to discuss the weight to be given. In that deposition there are ten different licensing agreements attached as exhibits, and I would like to at this time, if I may, offer an analysis that I

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

have made here as our Exhibit A, to go with the deposition.

The Court: Let's start out by having all the evidence that is going to be introduced, and the arguments afterwards.

Mr. Fulwider: I was thinking if this could be marked——

The Court: One thing at a time, gentlemen. Let me take care of these things right now. You are offering in conjunction with this hearing on the subject of damages the deposition, and you are waiving all the objections?

Mr. Fulwider: Yes, your Honor.

The Court: All right. The deposition will be received as a proper showing on the subject of damages.

The Clerk: Do you wish that given an exhibit number?

The Court: Yes, you may give it an exhibit number.

The Clerk: That will be Plaintiff's Exhibit A.

The Court: Let me see. There are some papers attached?

Mr. Huebner: There are contracts attached as exhibits.

Mr. Fulwider: They are numbered, I believe, 1 to 10.

The Court: Then call them A-1 to -10, inclusive.

(The documents referred to were marked Plaintiff's Exhibits A and A-1 to A-10, inclusive, and were received in evidence.) [3]

PLAINTIFF'S EXHIBIT A

In the United States District Court, Southern District of California, Central Division

Civil No. 5566-Y

JOHN T. GIBBS,

Plaintiff-Appellee,

vs.

TODD C. FAULKNER, et al.,

Defendants-Appellants.

DEPOSITION OF JOHN T. GIBBS

the plaintiff herein, called as a witness in his own behalf, on Wednesday, March 28, 1951, at the hour of 11 o'clock a.m. of said day, in the offices of Messrs. Huebner, Beehler, Worrel & Herzig, 410 Story Building, 610 South Broadway, Los Angeles, California, pursuant to oral stipulation of counsel, before C. W. McClain, a Notary Public in and for the County of Los Angeles, State of California.

Appearances:

For Plaintiff-Appellee:

MESSRS, HUEBNER, BEEHLER, WORREL & HERZIG, by

ALBERT M. HERZIG, ESQ.

For Defendants-Appellants:

ROBERT W. FULWIDER, ESQ.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Mr. Herzig: May the record show that this deposition was continued from a previous date, and is being taken upon stipulation?

Mr. Fulwider: Yes.

Mr. Herzig: Let the record show that the purpose of taking the present deposition of Mr. Gibbs, the plaintiff, is to conserve the time of the court in the hearing upon the question of damages, now set for April 9, 1951, and also on account of the possibility of the absence from the City during said time of the plaintiff, Mr. Gibbs.

JOHN T. GIBBS

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Herzig:

Q. You are the same John T. Gibbs who is the plaintiff in the present action, are you not?

A. Yes.

Q. Mr. Gibbs, will you tell us approximately how many licenses you have had outstanding during the unexpired term of your patent in suit?

A. Would that include the partnerships which I am also interested in as an operator, or just other agreements?

Q. I am referring now just to the agreements, that is, the license agreements.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

A. Eighteen, eighteen or nineteen.

Q. Do you know where those license agreements now are?

A. Well, a number of them I turned over to your office, and some of them are at an attorney's office in New York.

Q. Will you tell us what the general basis was that you used, the various considerations in your mind, when you entered into the various license arrangements, the terms?

A. The terms were generally based upon the number of months the location would operate. There are some locations which have only the summer season, which is two or two and a half months, when the park may be open or the beach may be open for business. Others are 10—8, 9 or 10 or 12 months. Then it is further based upon the potential amount of business that a place can do, according to the size of the city and the location of the business. The basis, generally, for the royalties has been for anything over 2½ to 3 months open, $3,000 royalty, plus a license agreement for the operation of the equipment, which is usually based upon the number of units which they purchased or leased from me, and also according to the potential location, as to the amount of profit that can be made in that operation.

Q. Now, we have several documents which purport to be license agreements, some of which were

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

referred to in a previous proceeding before Commissioner Head. I hand you what has been marked in that previous proceeding Exhibit 1, and ask if you will identify that?

A. The contract which I have in my hand is one between myself and Kahn's Amusement Corporation, and with T. Z. R. Amusement Corporation.

Mr. Fulwider: Any date on it?

A. June 9, 1936.

Q. (By Mr. Herzig): What type of location is that, Mr. Gibbs?

A. This is located on Coney Island, Brooklyn, New York. The season there is approximately a 5½ to 6 months' season. They have at times operated for 12 months. But the generally accepted season for amusement games is a 5½ or 6 months' season.

Q. What is the number of machines that are located at that place?

A. In this particular location there were 48 machines at one time, and at another time there were 52.

Q. Are they all in the same place?

A. For this one company, yes, they are all in the same place.

Q. Is that an exclusive arrangement, or do you have other licenses at Coney Island?

A. No, it is not an exclusive arrangement. There were two other operations in addition to this one operation.

Q. Whose were the other operations?

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

A. One was Kahn's Amusement Corporation. Another one was operated by a gentleman by the name of Moe Silverman. I don't recall the corporation name.

Q. And both of those latter were also licensed under the same patent in suit?

A. Yes. There were three separate places operating there.

Mr. Herzig: Mr. Reporter, will you mark that document from which Mr. Gibbs testified as Plaintiff's Exhibit 1, in this proceeding?

(Said license agreement was marked Plaintiff-Appellee Exhibit No. 1.)

The Witness: The corporation that Mr. Silverman operated was, as I recall, the M. & R. Amusement Corporation. I believe you have a contract there for them.

Mr. Herzig: Then we will get to it in its turn.

I now ask the reporter to mark as Plaintiff's Exhibit 2 a document which purports to be another license agreement.

(Said license agreement was marked Plaintiff-Appellee Exhibit No. 2.)

Q. (By Mr. Herzig): I will ask you if you will kindly identify that, first as to its date?

A. The 6th day of May, 1946.

Q. Who are the parties to the agreement?

A. John T. Gibbs and Kahn's Amusement Cor-

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

poration, with Eddie's Amusement Corporation.

Q. Was that one of the licenses granted under your patent in suit?

A. This is a modification agreement of the T. Z. R. Amusement Corporation, which is Exhibit No. 1.

Q. What is the location licensed in that agreement?

A. That is the location in Coney Island.

Q. The same location?

A. The same location as Exhibit 1.

Q. Was that the same location, from the standpoint of the housing of the unit, or was that the same location only as to Coney Island?

A. It is the same location as to the building and Coney Island.

Q. And the same machines operate under this?

A. The same machines, yes.

Q. What was the purpose of this agreement——

A. The purpose of this agreement——

Q. ——in view of the previous existence of the other agreement?

A. ——is the modification of the other agreement with T.Z.R. Corporation, wherein T.Z.R. Corporation, through some agreement with one of my other licensees, reduced the original 5 per cent of the gross receipts to a set fee per season, the set fee being $2,000, in place of the 5 per cent gross, which Exhibit 1 contract calls for.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Mr. Herzig: I have another license agreement, which I will ask the reporter to mark as Exhibit 3.

(Said license agreement was marked Plaintiff-Appellee Exhibit No. 3.)

Q. (By Mr. Herzig): I will hand you what purports to be another license agreement, and will ask you if you will identify that as to date?

A. It is an agreement made the 11th of January, 1947.

Q. And between what parties?

A. Between myself, John T. Gibbs, and Boardwalk Amusement Corporation, of the State of New Jersey.

Q. What type of location is that, Mr. Gibbs?

A. Atlantic City is another seasonal resort, having five or six months of business for this type of amusement. Atlantic City is open the year round, but the games are very seldom open longer than 5½ to 6 months.

Q. What is the number of machines installed in that location? A. 60.

Q. Under the same roof? A. Yes.

Q. Is that an exclusive arrangement?

A. No. There is another operator there.

Q. Also licensed by you? A. Yes.

Mr. Herzig: I ask that this document, which also purports to be a license agreement, be marked Exhibit 4.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

(Said license agreement was marked Plaintiff-Appellee Exhibit No. 4.)

Q. (By Mr. Herzig): Mr. Gibbs, I will hand you another license agreement, which is marked Exhibit 4, and ask if you will identify Exhibit 4 as to date? A. It is dated April, 1947.

Q. And who are the parties?

A. Between John T. Gibbs and Kahn's Amusement Corporation, with Eddie's Amusement Corporation.

Q. What type of location is that, or what type of location does that refer to?

A. This refers to the same location as was formerly mentioned in Exhibit 1. This is an amended contract with the T.Z.R. Amusement Corporation.

Q. And also at what place?

A. The same place of business, Coney Island.

Q. Does that Exhibit 4 relate to the same place of business? A. Yes.

Q. Under the same roof?

A. The same place, the same roof. These modification agreements are written up every year. You will note that the term of them is only for one year, whereas the T.Z.R. original contract, which is Exhibit 1, was for a longer period of time.

Q. Is Exhibit 4 also a non-exclusive arrangement, like Exhibit 1? A. Yes.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. Were there, at the time of the execution of and for the period mentioned in Exhibit 4, other operations at the same amusement area?

A. Two other operations.

Mr. Herzig: I will ask to have this license agreement marked Exhibit 5.

(Said license agreement was marked Plaintiff-Appellee Exhibit 5.)

Q. (By Mr. Herzig): I now hand you this document, and will ask if you will identify Exhibit 5 as to date, parties and location?

A. The date is the 13th day of May, 1946, between John T. Gibbs and Kahn's Amusement Corporation, with M. & R. Amusement Co., Inc.

Q. What is the nature of the location, the installation?

A. That is another one at Coney Island, on the Boardwalk on Coney Island, Brooklyn, New York.

Q. What is the number of machines installed at that location?

A. There are approximately 50. I don't believe it mentions the number, and I would have to take that from memory.

Q. During what period of the year or portion of the year are these machines mentioned in Exhibit 5 in operation?

A. This is the same location as the T.Z.R. Amusement Corporation. It is the same locality in Coney Island, and the season there is 5½ to 6

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

months. Sometimes the games have stayed open longer than that, and other years they haven't.

Q. Did you give us the number of machines that were in operations at that place?

A. Yes. I said approximately 50—48 or 50.

Q. Was that an exclusive arrangement?

A. No—non-exclusive.

Q. How many other operations were there in that amusement place?

A. There were two others.

Mr. Herzig: I will ask the reporter to mark this other license agreement as Exhibit 6.

(Said license agreement was marked Plaintiff-Appellee Exhibit No. 6.)

Q. (By Mr. Herzig): I hand you this license agreement, or what purports to be another license agreement, and ask you if you will identify that in a similar manner, as to date and parties and location?

A. It was made the 11th of January, 1947, between John T. Gibbs and Philip Albert, of New York City, Borough of Brooklyn, New York City.

Q. What, if you recall, was the purpose of the agreement Exhibit 6?

A. It was a general agreement in settlement of equipment which had already been manufactured by Philip Albert and Associates.

Q. I hand you now another document, which I will ask the reporter to mark as Exhibit 7.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

(Said document was marked Plaintiff-Appellee Exhibit No. 7.)

Q. (By Mr. Herzig): I will ask you to identify Exhibit 7 in a similar manner, as to date and parties?

A. The date is the 10th day of January, 1947, between Kahn's Amusement Corporation, John T. Gibbs, with Julian Levy, of Westfield, New Jersey, and Bernard Forgosch.

Q. What, in general, was this agreement?

A. This was for a small beach in Staten Island, known as South Beach, Staten Island, just a small summer resort, having an operation of about 2½ months.

Q. What is the number of machines located at South Beach, Staten Island, under this agreement?

A. 50 units. I believe they operated fewer than that number.

Q. Was this an exclusive arrangement, or were there other operations, during the term of this agreement?

A. I don't see here any exclusive agreement on it, but I believe it is an exclusive agreement for that territory. The beach itself is such a small beach, and has such a very small crowd there that it wouldn't warrant having more than one.

Mr. Herzig: I will ask to have this agreement marked Exhibit 8.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

(Said agreement was marked Plaintiff-Appellee Exhibit No. 8.)

Q. (By Mr. Herzig): Mr. Gibbs, I hand you next this agreement, and will ask you to identify that?

A. This agreement was made the 21st day of February, 1946, between John T. Gibbs, with Harry Kassel, of Brooklyn, New York, and Mr. Herman Bakerman, of Keansburg, New Jersey.

Q. Is this another license agreement?

A. It is a license arrangement for 48 units, for a small beach in the State of New Jersey, known as Keansburg, New Jersey.

Q. Are there any other operations at that amusement place?

A. There is no other "Fascination" game equipment, my equipment, licensed by me.

Q. None licensed by you?

A. No, none licensed by me. That is another very small park of 2½ months general season.

Mr. Herzig: I will ask to have this agreement marked Exhibit No. 9.

(Said agreement was marked Plaintiff-Appellee Exhibit No. 9.)

Q. (By Mr. Herzig): I hand you what has been marked Exhibit 9, and will ask you to identify this exhibit.

A. This agreement was entered into the 5th day

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

of December, 1940, between John T. Gibbs and William L. O'Brien, Jr., of Revere Beach, Massachusetts.

Q. What are the number of machines operated under that license?

A. The number of machines calling for operation for Revere Beach was 50, but this also mentions two other locations.

Q. Do you recall how many were, in fact, operated under the agreement?

A. 50 were in operation there.

Q. You say there were other operators licensed by you at the same location, at Revere Beach?

A. There was another operation there. This, I believe, is an exclusive license, and, through his license, he had another operation there.

Q. Which was permitted under this agreement?

A. Yes.

Q. As to all these licenses and agreements, Exhibits 1 through 9, which you have just identified, were they all in force and actually operative for the terms that are mentioned in the agreements?

A. Yes, all of them were.

Q. Did you receive the amounts of money that are stated to have been paid in these agreements?

A. Yes.

Q. Were the number of machines that were operated at any of these locations any criteria in determining the terms of these licenses?

A. No. The only basis that the terms were

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

judged upon was mainly the location, as to where they were operated.

Q. Will you explain that?

A. Well, in other words, my contract wasn't based on the amount of units which they put in. It was the type of operation, the length of season which the games could operate in that particular location, the amount of business that was possible in that location.

Mr. Herzig: I will ask to have this so-called compromise agreement marked as Exhibit 10.

(Said compromise agreement was marked Plaintiff-Appellee Exhibit 10.)

Q. (By Mr. Herzig): I now hand you what has been marked Exhibit 10, which purports to be a compromise agreement, relating to a license in the Long Beach, California, area, and ask you if you will identify that?

A. This was made between John T. Gibbs with Arthur Looff, Margaret Mary Looff, James Anglemyer, Douglas Wiser and Loretta Cecilia Wiser. They are all operating under the fictitious name, the fictitious firm name of Skill Games, of Long Beach, California. The date of the contract is the 15th day of February, 1946.

Q. Were there some alleged sums stated to be due under that agreement, as called for?

A. All payments were made.

Q. Was that agreement in full force and effect,

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

according to the terms and conditions thereof, during the life of the agreement, as stated therein?

A. Yes.

Q. Does the agreement, Exhibit 10, reflect the true value of that location, in view of your other licensing arrangements?

A. I wouldn't say that it did.

Q. Will you explain that?

A. Well, this agreement was made with Skill Games under rather strained circumstances, in that there were two other games in operation there, and an exclusive could not be granted, in that sense of the word, inasmuch as there were two others, and litigation would have to be involved.

Q. What, if any, other terms and conditions would you have arrived at, in view of your prior experience in licensing under your patent?

Mr. Fulwider: I will object to that. What he might have done I don't think is relevant to this inquiry.

The Witness: I may go on further. I stated at first that this wasn't exactly a normal contract. In the first place, Long Beach itself and its location, and the location of the other games there, were a 12 months' operation, a year's operation, and therefore far more valuable, as far as the license agreement is concerned, than many of my others, which were just in seasonal locations.

Mr. Herzig: Will you read back that answer, Mr. Reporter, please?

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

(The answer was read by the reporter.)

A. (Continuing): Further also, I have other contracts which aren't here. One happens to be with the——

Mr. Fulwider: I will object to his testifying about any contracts that are not here. If he wants to produce them, that is all right.

Q. (By Mr. Herzig): What, if any, discussion did you have leading up to the agreement, Exhibit 10, concerning the fact that the licensees under that contract would not have an exclusive in this Long Beach area?

Mr. Fulwider: I object to any discussion prior to the agreement. I think the agreement speaks for itself. That supersedes all prior negotiations.

Mr. Herzig: I believe you are right, that it does, but I would like to have Mr. Gibbs testify as to any negotiations which might bear upon the question of the value of the Long Beach area.

Mr. Fulwider: I don't think that is proper, in view of the fact that he did arrive at a compromise agreement. You can ask him, if you want to——

Mr. Herzig: Let's take it off the record.

Mr. Fulwider: But I will object at the time.

Mr. Herzig: Off the record.

Mr. Fulwider: Yes.

(Discussion off the record.)

Q. (By Mr. Herzig): Preliminary to the agree-

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

ment Exhibit 10, was there any discussion concerning the value of the license, under the conditions under which it was made, that is to say, the presence of the other operators, Hicks, Anderson and Faulkner, referred to therein, and what those conditions would have been if you were able to give Mr. Looff and other licensees an exclusive in the Long Beach area?

Mr. Herzig: I take it that this question is objected to on grounds which were discussed between counsel off the record, but that, if it is deemed proper, the form of the question is not objected to.

Mr. Fulwider: I was going to say, as to any conversations that he is going to relate, he should lay the proper foundation as to parties present and time and place.

Q. (By Mr. Herzig): Preliminary to the execution of Exhibit 10, were there any meetings between you and the licensees?

A. Several meetings, yes.

Q. When were those meetings held?

A. They were held for a period of two months prior to the agreement.

Q. Where were they held?

A. They were held in Mr. Looff's office in Long Beach, and also at his patent counsel's office. Mr. Lyon, I believe, is his patent counsel.

Q. Who were present at those meetings?

A. An associate—I don't know whether he is actually an associate—he is not mentioned here—

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

but he was Mr. Looff's manager at Long Beach, Mr. Al Brown, and myself and Mr. Looff were the ones that were mainly discussing it, outside of his attorneys, at a later date.

Q. What, if anything, do you recall of these conversations? What was said?

Mr. Fulwider: I object on the ground of hearsay, as well as materiality.

Mr. Herzig: Off the record.

(Discussion off the record.)

Q. (By Mr. Herzig): Mr. Gibbs, what is your occupation?

A. My occupation is manufacturer of amusement equipment and operating amusement equipment.

Q. What type of amusement equipment?

A. Mostly skill games and "Fascination" equipment.

Q. Is that the same equipment that is described and claimed in the patent in suit?

A. The equipment in the patent in suit is also known as "Fascination Game."

Q. Is the "Fascination Game" the game that you license under your patent in suit?

A. Yes, it is.

Q. How do you operate your business of "Fascination"?

A. There are several phases of the business. There is the licensing of it, and there is manu-

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

facturing of the equipment, and also the operation of the equipment itself to the public.

Q. Approximately how many machines, as an estimate, have been operating under licenses of your patent?

A. Approximately 850 to 900 units.

Q. Over how long a period of time?

A. About 20 years.

Q. During all this time have you observed the operation of the machines?

A. I have not only observed the operation, but I have been in the operation myself, as a business, throughout the United States.

Q. And set them up for business?

A. And set them up for business, and also operated them as a business.

Q. And collected the money? A. Yes.

Q. And regulated the operation of the machines?

A. The general operation of the business, yes.

Q. Have you done any traveling in connection with the business of exploiting the "Fascination" game?

A. Yes, throughout the United States.

Q. Where?

A. Well, criss-crossing the country from Massachusetts to Florida, and all up and down the Atlantic Seaboard, the Midwest, the Pacific Coast Area, the Northwest Area, and the Mountain States Area.

Q. Are you familiar with the principal amuse-

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

ment places, then, in the United States, in which "Fascination" games have been installed and might be installed?

A. Yes, I am. And I am also a member of the National Association of Amusement Parks, Pools and Beaches, which is an association of amusement parks, park owners, managers, concessionaires, everything pertaining to the general amusement business.

Q. Are you able, on visiting an amusement center, to make an accurate appraisal of the value of that amusement center from the standpoint of its worth in installing "Fascination" games?

A. Yes, I think I am. After all, I do invest my own money in it, and I have to have some ideas as to what a location or park is worth and valued at.

Q. From what standpoint?

A. From the standpoint of returns in business and value, what it is worth as a licensed "Fascination" business or place, for operation.

Q. Judging from this experience, then, what is your estimate of the worth of the Long Beach Area prior to the installation of any "Fascination" games?

A. The Long Beach Amusement Area has always been a good business place for amusement games, in fact, one of the best in the United States. I formerly operated there myself, in 1931. At the present time I am now investing in the neighbor-

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

hood of $50,000 in opening up a location on The Pike in Long Beach.

Q. What were you operating in 1931?

A. "Fascination."

Q. The same game? A. Yes.

Q. As that in suit?

A. Yes. That was the original location of the "Fascination" unit, the original model.

Q. From the standpoint of a license on an exclusive basis in Long Beach, what would be the value of such a license?

Mr. Fulwider: We object, unless you qualify him as an expert, qualify him to give his opinion as an expert. Otherwise his answer is immaterial.

Mr. Herzig: All right, as an expert.

The Witness: Will you repeat that for me, please?

(The question was read by the reporter.)

Q. (By Mr. Herzig): In your opinion?

A. You mean the granting of a license, or someone coming to me and asking what it is worth, or my opinion as to what I would say it was?

Q. What, in your opinion, would be the value of the Long Beach exclusive installation under your patent?

A. An exclusive installation under my patent, it is very difficult to put an exact value on it, because the amount of money that can be made there, what has been made, is so tremendous.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. Be specific, if you can. First try to give us an estimate of what you think it would be worth.

A. I would estimate that it would be worth about $10,000 a year license fee. To back up that opinion, an associate of mine is paying $25,000 for a 50 per cent interest.

Mr. Fulwider: We will move to strike that answer as volunteered and not in answer to the question.

Mr. Herzig: We don't object to the answer, and we feel that it is a proper answer.

Q. (By Mr. Herzig): Were you familiar with the location 101 Pike, which Mr. Faulkner, the defendant here, was operating? A. Yes.

Q. When did you first visit it?

A. It was the summer of 1945, I believe.

Q. Thereafter did you visit it any more?

A. Yes, several times.

Q. Approximately how many times?

A. Oh, I would say I dropped in 15 or 20 times, maybe more.

Q. Over what period of time?

A. I would say it was over two or three months. I was living in the East at the time, and I made two trips out here, and it was during the period of those two different trips. The entire term was probably three months.

Q. In 1945?

A. '45 and in '46, I would say, those two years.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. During what time of the day did you visit him?

A. It was both in the afternoon and the evening.

Q. Did you observe the number of machines that were in operation? A. Yes.

Q. Do you recall how many there were?

A. I believe there were 32 at one time. I don't know when the period was. They were only using 16, and it seems that sometimes they were using both sections of 16 units.

Q. Did you note the time of play of each game?

A. Yes.

Q. What was it?

A. They were running at that time approximately 35 games an hour, at times more than that.

Q. Did you note the number of players that were engaged in play? A. Yes.

Q. How many were there?

A. Generally, when they had one side—I refer to it as "side," 16 units—they had 16 units on each side of the room. And the players, there would be 14 or 15 players to a section.

Q. In general, were there usually vacancies?

A. There were vacant seats, if they were running both sections, in other words, if they were running one section, there were very few vacant seats in that section. When they were running both sides—the sides I recall as both sides—when I saw both sides operating, they were running fairly

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

well to capacity. I would say not more than 20 per cent of the seats were vacant.

Q. And during the rest of the time?

A. The rest of the time, when they had one side operating, they usually had it pretty well to capacity, 13 to 14 units in play, and there were only 16 total units tied together.

Q. From your observations and from your experiences in visiting these games, can you estimate the probable gross receipts——

Mr. Fulwider: We will object to that.

Q. (By Mr. Herzig): ——per day of operation at the location 101 The Pike?

Mr. Fulwider: We will object to that. There is no sufficient foundation laid to show that he has adequate knowledge upon which to make such an estimate, and, further, that he is not an expert as to that particular location.

Q. (By Mr. Herzig): As to your previous operation on The Pike, where was that?

A. That was at 103 Pike.

Q. How far is that from the location 101 Pike?

A. Next door.

Q. How many machines did you have operating at that time? A. I believe 24.

Q. Do you have any present recollection of your total receipts at that location?

A. Well, it is a long ways back.

Mr. Fulwider: Do you know what year that was? A. 1931.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. (By Mr. Herzig): For how long a period of time did you operate at that location?

A. I was interested in the business there for about a year and a half.

Q. Did you have personal knowledge of the business from the standpoint of the operations, receipts? A. Yes.

Q. How much of the time did you spend at that location at that time?

A. I gave all my time for the first five or six months of its operation, after that I was operating another location in Ocean Park, California.

Q. Will you describe, in as much detail as you can, your particular duties with respect to the business at 103 Pike?

A. My particular duties were the general running and operation of the business, the collecting of cash, the purchasing of merchandise, the giving out of merchandise, and the general duties of an owner and manager of the business.

Q. Did you have supervision over the payment of bills? A. Yes.

Q. And of the receipts taken in? A. Yes.

Q. And did you receive any profit that was made at that time? A. Yes.

Q. I now direct your attention again to the location at 101 Pike, operated by the defendant, and ask again whether you can estimate the approximate day's receipts of the operation at that address, 101 Pike?

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Mr. Fulwider: We still object to that. There is no sufficient foundation laid to show that he had enough knowledge of the operation at 101, and it is objected to on that ground.

Mr. Herzig: Answer the question, please.

A. In observing the play, it was very simple procedure to find out, in a game of this type, how much money was taken in, and how much is given out as prizes. They had a certain set prize there, and a certain cost per seat.

Q. (By Mr. Herzig): What place are you referring to?

A. At 101 Pike, Mr. Faulkner's location.

Q. Continue, please.

A. At the different visits that I made there, they had two different price schedules. At one time they were charging 10 cents a seat, and when 16 people play they are taking in $1.60, and at that time they were giving out——

Q. Did you play the game? A. Yes.

Q. How many times?

A. Oh, I must have played it 30 or 40 times.

Q. During the whole period? A. Yes.

Q. That you visited the place? A. Yes.

Q. Did you play it each time you visited it?

A. Not each time, but mostly just observed the operation.

Q. Continue, please.

A. At the time when they were charging 10 cents per seat, per game, to play, they were giving

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

out in the neighborhood, equivalent to $1 in merchandise or free play, so, therefore, they had a profit on their game of 60 cents a game; and running 35 games an hour, they had approximately $20 an hour profit from the game operation itself. The profit which I am referring to is the difference between the amount which the game gave out in free plays and merchandise, and the amount which they grossed from the players.

At other times they operated at 20 cents a seat, from which they had a gross of $3.20 for 16 units, and at that time they gave out $2 in free plays and merchandise, giving them $1.20 profit per game. Basing their operation on only having one side of the units playing, or 16 units, instead of both of them, they had a potential profit there of $20 an hour, at the 10 cent price, and approximately $40 an hour at the 20 cent price. That profit is what is termed in the amusement business as a gross net or a net gross, in other words, the amount of money which one takes in from the players, and the amount which they give out. Other normal expenses, such as rent, overhead and help, are in addition to that.

Q. Do you have any knowledge of what the rent, overhead and help would be or was at 101 West Pike? Do you have any opinion?

Mr. Fulwider: I object to his opinion. I have a standing objection to all opinions.

A. Well, the number of employees he had there,

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

and I know approximately the amount of rent that he pays or did pay, and I would judge $60 a day for help, rent and general expenses would be about the average of what anyone would pay operating that same type of business, there or elsewhere.

Q. How would you arrive at the profit to the operator of the machines?

A. The profit of an operation of a game is the amount of cash received, less the amount of free plays or merchandise given out.

Q. What about overhead?

A. And then from that you take your overhead out. The net gross which I referred to earlier is only the amount of money that the game operator has left after he has given out those prizes or premiums or free games.

Q. Will you compare the conditions of business at The Pike at the time you operated at 103 with the conditions of business at 101, when you visited 101?

A. At the time when I visited 101, the general business conditions were far greater, necessarily, and also in Long Beach.

Q. Greater?

A. Business conditions were better and greater at that period, during the last part of the war and shortly after. My operation there was during the height of the so-called depression of 1929.

Q. Would you say that the operations at 101 and

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

at 103, but for this differential, were generally comparable?

Mr. Fulwider: I object to that as calling for a conclusion or opinion.

A. The only way I could answer that is that I do know what business I did in 1931, and I am quite certain it is generally accepted that business conditions generally in 1931 were in no way equivalent to the business conditions of 1945, 1946 and 1947. My observation was during 1946 and 1947, and I am quite certain their profits were far greater than mine in 1931, when I operated in that period of 1931 and 1932, due to general conditions nationally, and knowing that 1931 and 1932 were the great depression years, as against 1945, 1946 and 1947, which were highly profitable to all people in the business.

Mr. Fulwider: I object to all that on the ground that it is hearsay.

Q. (By Mr. Herzig): In giving your comparison of the times during which the respective operations took place, will you relate it specifically to the two locations at 101 and 103, rather than the general business conditions all over the country? In other words, what were the conditions at those times at the two locations in question, at The Pike?

A. Business in 1931 and 1932 was very poor in Long Beach. The city itself increased in population from 140,000 in 1930 to 260,000 in 1948, so, there-

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

fore, they had twice as many people, besides the conditions being greater there for business.

Q. What was the relative opportunity for profit at 101 West Pike and 103 West Pike thereafter, in your opinion?

A. I don't quite follow that.

Mr. Herzig: Will you read him the question?

(The question was read by the reporter.)

A. I would say that business conditions were two or three hundred per cent increased in 1945, 1946 and 1947 over the period of 1931 and 1932.

Mr. Fulwider: I have a continuing objection to this whole line, you understand?

Mr. Herzig: Yes.

Q. (By Mr. Herzig): What was the approximate square footage of the Faulkner establishment at 101 Pike?

Mr. Fulwider: Does he know?

Q. (By Mr. Herzig): If you know?

A. I believe he had a 16 or 18-foot front, and the depth was approximately 70 feet—around 1300 or 1400 square feet.

Q. And at 103, during your operation?

A. 103 was approximately the same area.

Q. Is there any circumstance or condition that you know of that would give one a lesser opportunity for profit at 103, during the time of its operation, than at 101, during its operation?

A. Yes. 101, being a corner location, is naturally

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

known as being a better type of location than one more in the center of the building.

Q. Is it a better location, in your opinion?

A. Yes, definitely it is.

Mr. Herzig: Well, it is 1 o'clock.

Mr. Fulwider: What about lunch?

(Whereupon a recess was taken until 2 p.m. of this date, Wednesday, March 28, 1951.)

(Met pursuant to adjournment at 2 o'clock p.m., Wednesday, March 28, 1951, the same parties being present as before.)

Mr. Herzig: I have a couple more things that I would like to take up with the witness.

JOHN T. GIBBS

recalled, testified further as follows:

Direct Examination
(Continued)

By Mr. Herzig:

Q. Mr. Gibbs, you have testified to what you believe was the hourly profit made by Mr. Faulkner. Will you further estimate, on the basis of your observation and experience, what the monthly profit would have been at that location during the period of its operation?

Mr. Fulwider: The same continuing objection.

A. I would say around $3,000 a month.

Q. (By Mr. Herzig): And annually?

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

A. It would be $36,000. That was during the period of the 1945 and part of the 1946 operation, as far as I could judge.

Q. 1945 and 1946? A. Yes.

Q. You testified that Mr. Faulkner had, at the 101 Pike location, 32 machines; is that correct?

A. Yes.

Q. You also testified, did you not, prior to the recess, that you have made or caused to be made "Fascination" machines of a similar type?

A. Yes.

Q. And that you have leased the machines; is that correct? A. Yes.

Q. Will you explain the terms of your lease arrangement?

A. The terms of the lease arrangement on the equipment furnished by me is the cost of the equipment, which is my cost, plus an average profit of $150 per unit. That total amount would have been the fee for the license arrangement.

Q. In other words, what would be your profit?

A. My profit is in the neighborhood of $150 a unit, was, during that period, at that time. It is a little greater now.

Q. Solely for the use of the unit, solely for the lease of the unit?

A. That was my profit above my cost of manufacturing the equipment, and which the person leasing it from me paid.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. In other words, what was your net profit from the lease of each machine?

A. $150 per unit, per machine.

Q. Did you provide machines for every operation authorized by you?

A. In all cases, no. Where there had been litigation and the party with whom I was involved in litigation had manufactured his own equipment, then that equipment, in all the agreements, was turned over to me as part of my settlement, and then I leased that equipment back to them for their operation. In the other operations, wherein I furnished the equipment, all that equipment has been built by me.

Q. In other words, in all cases where you have——

Mr. Fulwider: As long as this is your witness, I think you shouldn't lead him so much.

Mr. Herzig: Off the record.

(Short discussion off the record.)

Q. (By Mr. Herzig): What was the origin of the machines which were used by your licensees, taken as a whole?

A. Part of those I manufactured myself. In the other cases, where litigation was involved, and they had already manufactured their own equipment, then they used their equipment.

Q. What was the disposition of the equipment that was not authorized to be made or used by you?

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

A. That was, in most cases, assigned to me, or, rather, a bill of sale was given to me, and then I leased that equipment back to the parties under a license agreement.

Q. Did you obtain any additional income or profit by virtue of the lease back?

A. Yes, I did.

Q. How much was that?

A. Well, in many particular instances, on my own equipment, which I furnished, I had a profit, as I say, in the neighborhood of $150 per unit.

Q. Those were on machines authorized by you?

A. Those were on machines authorized by me.

Q. And manufactured by you?

A. And manufactured by me. In the others, wherein litigation was involved, oftentimes there was a set—not a set fee, but an amount they paid me for the license agreement, and so much royalty per year to continue their business.

Q. If you had furnished the defendant Faulkner with his machines, pursuant to a license arrangement with him, what, if anything, would you have profited by supplying the machines?

A. About $5,000.

Q. Based upon a fair unit profit of what?

A. In the neighborhood of $150.

Q. What, if you know, have you to date paid out in attorney's fees on account of this litigation?

A. About eleven thousand three hundred and some odd dollars.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. Are additional expenses now being incurred?

A. Yes.

Q. Do you know what proportion of the total paid out by you in attorney's fees was on account of appeal to the District Court and United States Supreme Court?

A. Well, not actually knowing the breakdown of it, I would say approximately 40 per cent of that amount has been in the two appeals.

Q. Do you have any oral agreements?

A. Yes, I have had several oral agreements.

Q. Which were in effect during the life of the patent? A. Yes.

Q. Please tell us what those are?

A. With the people O'Brien and O'Connell, on which you have one contract there—I don't know which exhibit it is——

Q. Just a moment. Exhibit 9. I show you Exhibit 9. Is that the agreement you refer to?

A. I am referring to the two people that are in this agreement, Mr. William L. O'Brien, Jr.

Q. As licensees under Exhibit 9?

A. He has a partner, an associate, by the name of O'Connell, and I have had five oral agreements with them for operation in Ocean Park, California, for which they paid $3,000 a season, plus the purchase of 52 units of "Fascination," at $375 a unit. Also Atlantic City, New Jersey, in which they purchased seventy units, at $375 per unit, and for which they paid $3,000 a year royalty. Also Olympic

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Park, New Jersey, which is a small summer resort park, which has approximately a 100-day operation per season, for which they pay $1,000 a year royalty. Also one at Wildwood, New Jersey, which is also a small summer operation park, for which they pay $1,000 royalty.

Q. Per year?

A. Per year. And in each case they have purchased equipment from me, on which I should have made a profit of approximately $150 per unit.

Q. In the Ocean Park location, you mentioned the figure of $375 per machine? A. Yes.

Q. What portion of that is profit?

A. At that time it was about—I believe the cost on those machines was about $140.

Q. The individuals you are referring to as your oral licensees are the same individuals referred to in Exhibit 9?

A. Yes, with the addition of Mr. O'Connell.

Q. Are there any other locations in which you have had oral agreements or licenses?

A. I believe with Mr. Sydney Kahn. And we have had one other operation other than the ones in the contracts here. And in several cases, where a licensee has had an agreement on one location, they have worked another location, found another location in the resort, which is operated on the original license agreement, and there has been no further one drawn up.

Q. Do you have any other oral arrangements,

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

which are not licensing arrangements, but in which you participate in profits from the operation?

A. I have a contract, a written contract, with Mr. Fitzsimmons, at Santa Cruz Beach, California, in which he infringed on my equipment.

Q. In what year, please?

A. The agreement, I believe, was signed in 1946.

Q. You say the agreement was signed?

A. Yes. This was a written agreement, which I haven't quite been able to locate yet. I am trying to. I doubt if it is lost. This agreement contains the——

Mr. Fulwider: The agreement is the best evidence. I object.

Mr. Herzig: I think the objection is well taken. If the agreement can be found, and if the agreement is found we will make it available as soon as we find it. Meanwhile, I will ask that the witness proceed in setting forth the terms of the agreement.

A. The terms of the agreement were the payment of $10,000 for the period prior to the time the contract was signed, or the time he had operated the so-called infringing equipment. And then the agreement calls for a partnership arrangement between myself and Mr. Fitzsimmons, wherein I receive 50 per cent of the net profits of the operation.

Q. Do you recall what the net profits were during the years, which should be specified?

A. There were only 15 units involved. It was a very small operation. As I recall, I received in the neighborhood of twenty-four or twenty-five hundred

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

the first year, and just under two thousand, I think, the past two seasons. The agreement is still in effect, because at the time we signed the agreement, it was for a period, I believe for five years' operation.

Mr. Herzig: Will you read back that last answer, please, Mr. McClain?

(The answer was read by the reporter.)

Q. (By Mr. Herzig): What was the first year that you referred to?

A. It must have been '47.

Q. 1947? A. 1947.

Q. And what were the two subsequent years that you referred to?

A. '48 and '49. I just received a further statement—I think I have the statement home—of the partnership. They sent this down to me for my file. And I think that includes about eleven or twelve hundred dollars.

Mr . Herzig: Off the record, for a moment.

(Short discussion off the record.)

Q. (By Mr. Herzig: Mr. Gibbs, besides the year and a half operation at 103 Pike that we have talked about, have you at any time engaged or undertaken to engage in the business of operating your machines at The Pike, in Long Beach?

A. Yes. I am now engaged in the remodeling of a building and the building of equipment for

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

the Long Beach Area, which address is 100 West Pike, and on which we formed a corporation, capitalized at $50,000, of which Mr. Sydney Kahn purchased 50 per cent of the corporation stock for $25,000.

Q. Is that Sydney Kahn in any way connected with Kahn's Amusement Corporation, licensee under Exhibit 1?

A. Yes. He is the president of that corporation.

Q. Has he actually paid in, in cash, the amount you have specified?

A. At the present date he has paid in cash $20,000. There is still $5,000 that he will have to put up.

Mr. Herzig: Off the record.

(Short discussion off the record.)

Mr. Herzig: That is all.

Cross-Examination

By Mr. Fulwider:

Q. Mr. Gibbs, of the various games which have been licensed and about which you have spoken, how many of those were made according to drawings of the patent, and how many were made of the type operated by Looff in Long Beach? In other words, how many used balls like those shown in the patent, and how many used marbles with shooters, like those used by the defendant?

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

A. There is only one other place, and that is in San Francisco.

Q. In San Francisco there is a marble type shooter? A. That I know of, yes.

Q. And Looff in Long Beach?

A. Looff in Long Beach. And then there was another man down there by the name of Hicks, I think, that we won the case on. There may be some other small ones around that I don't know of, but as far as any knowledge I have had, that is the only place, except in San Francisco.

Q. Of these 650 games which you have manufactured yourself, they have all been the ball type, then, and not the marble type?

A. Yes, except a certain portion of the 650, yes. Of the 850, no.

Q. There are at present 200, at least 200, we will say, of the marble type?

A. No. I am in production now on 136 of the marble type at the present time.

Q. How long did the T.Z.R. Corporation operate prior to the date of your agreement, Exhibit 1, of June 9, 1936?

A. They operated part of a season prior to that, was all.

Q. Just one season?

A. Yes. In other words, litigation was on for six or seven months after they opened.

Q. I believe in paragraph 3 of that agreement, Exhibit 1, there was an option arrangement. Did

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

they ever take up the option given them in paragraph 3, wherein they were given the right to pay you——

Mr. Herzig: Do you mind letting him see that?

Mr. Fulwider: Sure (handing document to the witness).

Q. (By Mr. Fulwider): ——in lieu of $1,250 and 5 per cent, a flat sum of $3,000?

A. Yes, that option was exercised.

Q. That was, in fact, the basis for that renewal agreement of the Eddie Company, wasn't it, Exhibit 4, that Eddie agreement, Exhibit 4, Eddie being, as I understand, the successor of T.Z.R., which provided for $2,000 a year royalty, did it? That is correct, isn't it?

A. That's right. There are other considerations not mentioned in the contract.

Q. I believe you testified, as to the T.Z.R.-Eddie operation, that the normal season was 5½ or 6 months, and sometimes they ran 12 months; is that correct?

A. They tried to make a 12 months operation there, but there wasn't the business there.

Q. Did you check up on each year of the agreement to see how many months they operated?

A. Yes, because I also had a company there operating at the same time.

Q. Does Coney Island shut down completely for the winter?

A. Coney Island season is to the Mardi Gras,

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

which is a week after Labor Day. There are some places open sometimes Saturdays and Sundays, depending on the weather. There are many restaurants open. Actually, Coney Island is part of a small city. In other words, people reside around there, and as far as amusements are concerned most of those close down, except that sometimes some of them operate in the winter.

Q. When Eddie's Amusement Corporation took over T.Z.R., did they add any more "Fascination" units to the operation, or did it continue to be about 50?

A. They may have added two—between 48 and 50 at all times.

Q. So you would say an average of 50 would be about right? A. Yes.

Q. So, after the first year, they operated at two thousand dollars per year royalty?

A. That's true. I can clarify that, if I may.

Q. Yes.

A. You see, T.Z.R. Amusement Corporation, and then Eddie's Amusement Corporation, it seems like they were operating, and formed a new corporation, and they actually operated through Eddie's Amusement Corporation; and also another corporation, which was M. R. Company, Inc., on which they operated two locations. You have an agreement there, which is under $2,000. So, actually, from the original agreement, they operated two locations there at $4,000.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. All the same owners?

A. It was all mixed up. There were six or eight of them in it.

Q. This M. R. outfit—that was Exhibit 5?

A. Yes.

Q. Were you in Coney Island in each of the years 1946, 1947, 1948 and 1949?

A. I was there at times. I didn't live there, reside there permanently.

Q. Have you ever operated a concession in Coney Island? A. Yes.

Q. Yourself?

A. Yes, under the corporation of "Fascination, Inc.," and also "Novelty Amusement Corporation."

Q. When was that?

A. That was from 1936 until either 1947 or 1948, at which time I sold my interest. The corporations are still operating at the present time, but I sold my interest in '47 or '48.

Q. How long did the M. R. Amusement Corporation operate "Fascination" games prior to the date of the contract, Exhibit 5?

A. It was a very short time. I doubt if it was longer than a month or so. I don't quite recall. But they had manufactured equipment during the period of the litigation on the T.Z.R. suit. After the T.Z.R. suit, which was won by myself, then this contract was entered into. So they had a very short operation, and I couldn't say whether it was longer than a month, but I doubt it.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. What about Boardwalk, Exhibit 3 — is the Boardwalk Amusement Corporation connected with the M. R. Amusement Corporation, as far as you know?

A. No. Certain stockholders of the T.Z.R. and Eddie's Amusement Corporation are interested in that.

Q. But Boardwalk Amusement Corporation was a separate outfit? A. That is separate.

Q. Referring to Exhibit 3, dated January 11, 1947, approximately how long did the Boardwalk Amusement Corporation operate the game under their license, prior to the date of that license agreement?

A. I believe it was around, almost two seasons, because I know there was litigation on it, because one of the partners, the owners in that, was one of the T.Z.R. people, and we first tried to get him for contempt of court for violating the injunction from the court, for building the equipment, that they operated, I believe, for two seasons during this litigation.

Q. They had 50 units, didn't they?

A. They had 48 at one time, and they increased it to 50.

Q. Did Philip Albert and Herman Rapps ever grant any licenses under the master agreement which you made with them, Exhibit 6?

A. One agreement was made at Lake Pontchartrain, New Orleans.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. On the terms stipulated in this agreement, Exhibit 6?

A. I think it called for $2,000 for the use of the machines, and a $1,000 royalty, or something.

Q. That would be in accordance with the schedule set up in Exhibit 6?

A. Yes. Does Exhibit 6 have a schedule according to the months of operation?

Q. I think that calls for $2,000 down, and from $1,000 to $3,000 per year royalty.

A. That's right, yes.

Q. Now referring to Exhibit 7, between you and Julian Levy and Bernard Forgosch, how long had they operated the games in question prior to the date of their contract, January, 1947, at South Beach?

A. They operated part of the season before, which would be '46.

Q. Now referring to Exhibit 8, the agreement with Bakerman and Kassel, can you tell me what the various payments there are for? There was a $6,500 cash down payment, and there was a $6,700 payment upon delivery of equipment.

A. Well, it is for payment for granting them a license and furnishing them equipment.

Q. You sold equipment to them, in other words?

A. No, it doesn't call for a sale. It leases equipment.

Q. And they were to own the equipment when the license agreement expired?

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

A. That's right.

Q. When the patent expired?

A. That's right.

Q. Now, referring to Exhibit No. 9, your agreement with O'Brien, did O'Brien continue his license at Dade or Dade Beach, Florida?

A. No; he never actually signed the agreement.

Q. But he never operated down in Florida?

A. No.

Q. How many games did he operate in Massachusetts, or places other than Florida, altogether?

A. He operated, under this agreement, at one location in Revere Beach, Massachusetts.

Q. And how many games did he have there?

A. I believe 50 units. He may have increased it recently. Yes, as a matter of fact it has been increased. It was increased last year. I furnished new equipment last year.

Q. How long had O'Brien been operating this game, game units, prior to his contract with you, dated December 5, 1940?

A. He operated about two months of the season prior to the year he signed the contract.

Q. Did he ever grant any licenses to anybody else to manufacture?

A. No, not to manufacture.

Q. Or to use games?

A. I believe that some of this equipment that was mentioned in this, that he made some kind of

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

an operating agreement with another party in Revere Beach.

Q. How long did Looff operate in Long Beach prior to your agreement with him in 1946 sometime?

A. That was 1946, the 15th day of February, 1946. The only time I saw his operation there was in '45, when I first went out there. He may have operated the year before. I didn't see it. I saw it first in '45, when I started my suit against him.

Q. How many units was Looff operating when you made your agreement with him, Exhibit 10?

A. Looff was operating three sections of 16, and then he just opened another section, or was going to—I don't recall whether it was opened, another section—I believe he had 16 units in it.

Q. He did open that later, didn't he?

A. Yes.

Q. And he had another location, didn't he, on The Pike? A. That is the one.

Q. That was the fourth bank?

A. Yes, the fourth bank.

Q. When Hicks closed down, did Looff take over his operation? A. No.

Q. Is the Coney Island amusement center any larger than the Long Beach Pike?

A. It is a great deal larger, yes. The center itself, and the number of rides and all types of games, and so forth, extends up the Boardwalk, possibly extends three or four miles.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. And the number of people that patronize Coney Island in any one day is larger than the number that patronize the Long Beach Pike in any one day?

A. It is considerably more. There is a greater area in the amusement section, and the games—when the main traffic is confined to a smaller area, are found to do better business than where it is spread out.

Q. And they pull from the whole New York Area, don't they? A. Yes.

Q. I believe you mentioned that Faulkner's game on The Pike operated at 10 cents and 20 cents, to your observation. Did you, on any of the days you were there, note that one of the banks was operating for 5 cents per person?

A. I believe I noticed that on later trips. As a matter of fact, I think it was at the time this litigation started. At the time of the first two or three visits of mine, on my first trips there, they were not operating for a nickel then.

Q. They were 10 cents then?

A. They were 10 cents, and I think they were operating at 20 cents a game.

Q. So you don't know what percentage of the years from 1945 to 1950 the games operated at 5, 10 or 20 cents per person?

A. I would say, from my observation——

Q. You can answer that yes or no. You don't know, do you? A. With qualifications, yes.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. The answer is that you don't know, and then you can explain what you think; is that right?

A. The time that I noticed the 5 cents was later on, during the litigation, and I believe it was when the business was away off.

Q. And you visited the place at 101 Pike about 15 or 20 times, you think? A. Yes.

Q. During the years 1945 to 1946?

A. Yes, sir.

Q. Did you visit it during the years 1947, 1948, 1949 or 1950?

A. In 1947, yes. I may have once or twice in 1950.

Q. How often in '47, if you remember?

A. I would say half a dozen times or so.

Q. Do you know what system was followed by Faulkner in determining how many free games were to be given away?

A. At various different times I was down there, as I recall, at the instigation of this suit, there was an adjustment of the games, wherein he put a time clock on, and at that time it would probably vary from the previous free games or merchandise certificates.

Q. How many free games were given the first time you visited the Faulkner place at 101 West Pike?

A. I believe when the 10 cents was operating, it was 10 free plays, and also when the 20 cents was operating, it was also 10 free plays.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. And to whom were those free plays given?

A. The winners of the games.

Q. Were any free plays given to the people when they first came in, before they had played the game?

A. I never received any myself, but I understand they did. They had free game cards, allowed two or three free plays a day, in the afternoon or evening. But I never received any of those myself.

Q. So you wouldn't know how many of those they issued?

A. No, I have no way of knowing how many they issued—only enough to induce people to come in more often and spend more money.

Q. Have you ever examined any of the books and records of Mr. Faulkner as to his operation at 101 West Pike?

A. I saw some books here at one time, in Mr. Herzig's office.

Q. Were they Faulkner's books?

A. I presume they were made up at his request, or something.

Q. What kind of books were they?

A. Well, they were supposed to be books of his receipts and his operations.

Q. Do you remember for what period?

A. As I recall, it would be either 1945 and '46, or '46 and '47, as I recall.

Q. Who brought those books up, do you remember? A. That I don't know.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. Who was here explaining it to you, do you remember that?

Mr. Herzig: That is asking for a fact not in evidence.

A. I really don't know who was here.

Q. (By Mr. Fulwider): A young fellow by the name of Jack?

A. I don't believe those are the books that I mentioned.

Mr. Herzig: Just a minute. I don't understand the materiality of this.

Mr. Fulwider: This is cross-examination.

Mr. Herzig: I instruct you not to answer the last question. I object to the materiality of the same.

Mr. Fulwider: Well, he testified as a so-called expert as to what the defendants would have made. I am just trying to lay the foundation, which wasn't laid before, to find out whether or not he has any real knowledge of what the defendant made or what his expenses were. He testified that he saw some of Faulkner's books here at the office, and that gives him some reason to form an opinion.

The Witness: I said I am not certain——

Mr. Herzig: Just a minute. Have you asked him whether he based his previous estimate or opinion on the alleged books and records of Mr. Faulkner? If he hasn't said that he does, I don't see the materiality of Mr. Faulkner's books and records.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Mr. Fulwider: Well, with that remark of counsel, I would say that it is probably useless to ask him the question at this stage. As far as I know, I don't know of any way that Mr. Faulkner's books could get up in this office legally. Do you?

Mr. Herzig: Am I under oath?

Mr. Fulwider: You don't have to answer, if you don't want to.

Mr. Herzig: I have no objection to any questions that are pertinent as the basis for Mr. Gibbs' opinion. Of course, if these questions are being asked to lay the foundation for impeachment, I will withdraw the instructions, subject to motion to strike.

Q. (By Mr. Fulwider): Let me ask you, Mr. Gibbs: What do you remember of what those books showed for the gross income for the period covered by the books?

A. Whatever books I saw, whatever they were, I wouldn't base any opinion as to the business done on those books.

Q. Do you have any recollection as to what expenses they showed? A. No, I haven't

Q. So you weren't basing your previous estimate as to gross or net on your recollection of the information you obtained from the books here in the office?

A. No. On the contrary, I couldn't feel that that was a true picture of the business, from the records I saw.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Mr. Fulwider: We will move to strike that.

Q. (By Mr. Fulwider): Your answer is just "No." You didn't really have any real information as to how the Faulkner 101 place operated, did you, as to money in and money out?

A. I had information as to what should have come in and what should have gone out, but I don't know what actually happened to it, and I have no way of finding out.

Q. What information was this that you had?

A. By counting the number of players playing the game and the amount of merchandise they gave out.

Q. And from whom did you get that information as to the number of players?

A. By counting them myself.

Q. At times you were there? A. Yes.

Q. And from whom did you get the information about the expenses?

A. The information of one who is accustomed in this business to note the number of employees, and the average amount of players.

Q. So that is a mere guess, as to how the business was operated?

A. I think it is a little more than a guess.

Q. Based on your own experience?

A. Based on experience in operations throughout the United States. We have an average salary that we pay clerks, and the only place that varies a great deal is with your manager.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Q. And the free games that you mentioned a while ago that the winners got—— A. Yes.

Q. Those were tokens of some kind, that were given the player, that he could use in lieu of money for playing games?

A. That was given as a consideration of winning, which one can either get merchandise for, if they have any merchandise down there to give, or else they are used the same as money and played back, so it represents 10 cents, if it is a 10-cent game, or 20 cents, if it is a 20-cent game.

Q. Approximately when was it that you went over those books here of Faulkner's? What year was it, do you remember?

A. I don't know. I think you possibly can clear that up, because I believe it was—as I recall what that consisted of was a report sheet, or something, that you sent in. I don't know where they came from. Whatever ones I am referring to, it is something that I don't know whether they were actually books, but they were a summary of the year's business. I thought they were in your files or something you could supply to us on our request. I don't know.

Mr. Fulwider: That is all.

(It was stipulated by and between counsel that the witness may read over, correct and sign the foregoing deposition before any Notary Public.)

/s/ JOHN T. GIBBS.

Plaintiff's Exhibit A—(Continued)

Subscribed and sworn to before me this 23rd day of May, 1951.

[Seal] /s/ MARGARET BARNEY,
Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

I, C. W. McClain, do hereby certify that I am a Notary Public in and for the County of Los Angeles, State of California, and that the witness in the foregoing deposition named, John T. Gibbs, was by me duly sworn to testify the truth, the whole truth and nothing but the truth in the above-entitled cause; that said deposition was taken pursuant to oral stipulation of counsel, commencing at 11 o'clock a.m. on Wednesday, March 28, 1951, at the office of Messrs. Huebner, Beehler, Worrel & Herzig, 410 Story Building, 610 South Broadway, Los Angeles, California, and was completed on the same day; that said deposition was written down in shorthand writing by me, and was thereafter transcribed into typewriting under my immediate supervision, and that the foregoing 58 pages contain a true and correct transcription of my shorthand notes so taken.

I further certify that it was stipulated by and between counsel that the witness named in the foregoing deposition may read over, correct and sign his said deposition before any Notary Public.

I further certify that I am not connected by blood or marriage with either of the parties, nor interested, directly or indirectly, in the matter in controversy.

In Witness Whereof, I have hereunto set my hand and affixed my seal of office, this 2nd day of April, 1951.

[Seal] /s/ C. W. McCLAIN,
Notary Public in and for the County of Los Angeles, State of California.

Received May 28, 1951.

Mr. Huebner: I next offer in evidence the deposition of Todd C. Faulkner, taken on February 5, 1948.

Mr. Fulwider: And may I say at this time——

The Court: Is there anything else you want to offer?

Mr. Huebner: Those are all the papers.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

The Clerk: That is Plaintiff's Exhibit B.

(The document referred to was marked Plaintiff's Exhibit B, and was received in evidence.)

PLAINTIFF'S EXHIBIT B

In the District Court of the United States
Southern District of California,
Central Division

No. 5566-Y Civil

JOHN T. GIBBS,

Plaintiff,

vs.

TODD C. FAULKNER, et al.,

Defendants.

Deposition of Todd C. Faulkner, taken on behalf of the plaintiff, at 410 Walter P. Story Building, 610 South Broadway, Los Angeles 14, California, on Thursday, February 5, 1948, at 1:30 p.m., before Byron Oyler, a notary public within and for the County of Los Angeles and the State of California, pursuant to notice and subpoena attached to the deposition.

Appearances of Counsel:

For the Plaintiff:

HUEBNER, MALTBY & BEEHLER, By

ALBERT M. HERZIG, ESQ.

For the Defendants:

ROBERT W. FULWIDER, ESQ.

Plaintiff's Exhibit B—(Continued)

TODD C. FAULKNER

one of the defendants herein, called as a witness on behalf of the plaintiff, having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Herzig:

Q. Mr. Faulkner, you are the Todd C. Faulkner that is one of the defendants in the case of Gibbs versus Faulkner, No. 5566-Y in the District Court of the United States, Southern District of California, Central Division, and in which suit this deposition is being taken as a portion of the accounting proceedings? A. Yes.

Q. You have sat here and listened to the testimony of the two preceding witnesses, Mae Haws and Helen Fouch, to the effect that the day's receipts of the Fawn games are handed over in toto from an apron in which they are received to you, among others, at the end of the day?

A. They never hand them to me. They are dropped in a little box. I never see them. Let this Hilda clear it up. I never see those receipts. I never pay any attention to the money. Even if it was really some money, I still wouldn't want to receive it. I want it to go out that way and have them take care of it that way. They never hand me any of those receipts. If they ever have, I don't remember. They are dropped in the mail box.

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

Q. What mail box? A. At our home.

Q. By whom?

A. By whoever happens to be checking.

Q. By the checker?

A. Either that or like this Kid Holcomb, he gave me a big sales talk, that he was a good manager, so he went on as night manager for a while.

Q. It is your testimony, I take it, that you never—— A. No.

Q. ——received the cash receipts at the end of the day or at the end of any shift or at any time from the Fawn games, is that your testimony?

A. You see, they bring them out at night and they put them in the mail box. I never go down there. I don't remember even when I was around the place.

Q. It is your testimony you never have received the day's receipts?

A. I wouldn't say that. They might have handed it to me, but I sure don't remember it. If I did I probably would have taken it and laid it down somewhere else, or put it where I thought Hilda would take care of it. She checks the money.

Q. Who takes the money out of the mail box?

A. To tell the truth, I couldn't even tell you. Ask Hilda Potter those things. She will give it to you, I am sure.

Q. Whose mail box is it?

A. It is the mail box of my wife's home where I live.

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

Q. What is the address? A. 2255 Cerritos.

Q. What kind of a mail box is it?

A. I don't know. You just drop it in there, and there it is.

Q. Is it a mail box that opens into the house?

A. Yes. It opens into the house.

Q. Does it have a door on the front that you pull out, disclosing a drawer in which you can place the mail or other matter?

A. To tell the truth, I don't know. It is a mail box that opens into the house. I know that is where we get our mail.

Q. You can then reach into the mail box from within the house, without opening the door and obtain the mail, is that right?

A. From the outside?

Q. From the inside of the house?

A. You reach in and get your letters out or whatever is there.

Q. Can you reach into the box from the outside and open the mail that was put into it?

A. I don't know. I never tried. I never paid any attention to it.

Q. Do you regularly reside at the address you just gave? A. Yes, pretty regularly.

Q. When are you ordinarily there?

A. There is no way of saying. I come and go all the time. I might be there or I might not. I just go from one place to another.

Q. Who resides there with you?

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

A. My wife and our two sons.

Q. Does Hilda Potter reside there?

A. No, but her office is there.

Q. Her office is there?

A. Her office is in the home.

Q. When is she there?

A. Oh, she is liable to be there at any time. If my wife and I are gone for a few days, she sleeps there. I don't know what time she comes in. She is there early and late all the time.

Q. Does she sleep there?

A. No, she has a place of her own.

Q. On the premises?

A. No. I don't know where she lives.

Q. Does she have free access to your house?

A. Yes.

Q. Whether you are home or not?

A. She has a key to the front door. She is our trusted employee. I would trust her as much as I would trust anyone.

Q. Has she been instructed by you at any time to take the cash which is deposited, I understand, in the mail box, out of the mail box?

A. Oh, yes. I told her when she started to do it and that has been the routine ever since.

Q. Has she always been instructed to keep records of what came in?

A. She went through the Frank A. Crawford office as a competent bookkeeper that could do anything they had. I know nothing about books. I

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

have never seen her books. I have looked at figures, but I don't understand books. The different C.P.A.'s and the different people we have had check them, or that I have had, tell me about different systems or something—they say she is a competent bookkeeper.

Q. What does she do with the money after it is received? A. After she receives it?

Q. Yes.

A. She counts it and checks it with a slip that I got. I think Mr. Looff told me how to put that check system after Mae told me about this guy, you know, possibly not putting in all of the money. I asked Mr. Looff about it——

Q. Pardon me, who is this guy?

A. Herman.

Q. Who is Mae?

A. This girl who was in here.

Q. Mae Haws? A. Yes.

Q. All right.

A. So I put a check system on, and we checked them. Hilda has everything — to check by. We check their receipts and it is a double check on them every day.

Q. What does she do with the money after she has checked it and recorded it?

A. She takes it up and puts it in the bank.

Q. In whose name?

A. T. C. Faulkner or Todd C. Faulkner, I think.

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

Q. Is there any one authorized to draw checks against your account besides yourself?

A. No. I think—I am sure since this trip to Chicago we spoke of before, something happened later on and I couldn't sign payroll checks and I signed power of attorney so that my wife could make up the payroll.

Q. Aside from that period, did you sign all of the payroll and other checks yourself?

A. I wouldn't say I did half of it. I tried to be around—to do a little bit, but I don't pay any more attention to it, only when they call me.

Q. Who pays the payroll checks besides yourself, and other expenses of the business?

A. Mrs. Potter makes them up and I sign them myself.

Q. She makes up the checks?

A. Yes. You see, I can't write to speak of. She makes them out and I sign them.

Q. Do you know what the expenses of your business are?

A. She can tell you all of that.

Q. But do you know?

A. I know I am overdrawn all the time.

Q. You can't keep even?

A. I don't really know. She can give you that information. She knows and she can give it to you in a business-like way. This fellow gets so much and that fellow gets so much, and this gal gets so much,

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

but I might be wrong. I think I could tell you pretty well.

Q. You could tell pretty well what they get?

A. Yes. I have an idea but yet it could be wrong.

Q. What about the expenses of the business?

A. She has all of that, all of the bills.

Q. Do you know what they are? Do you know what you pay for rent there, or do you pay rent?

A. Yes, we pay rent. I think it is on a flat with a guarantee, and we pay the utilities.

Q. What is the flat?

A. I think it is four.

Q. You mean $400.00?

A. Yes, and the lights and utilities come to around $35.00 or $50.00 I think.

Q. What is the total payroll?

A. That I don't know. You will have to check that.

Q. Have you any idea what it comes to?

A. No. I wouldn't say. She knows.

Q. We are not asking for an accurate statement. We just want some idea from you.

A. Well, I don't even know how many people are around there, Mr. Herzig.

Q. I see.

A. I heard one say four and the other one say six. I don't know who is working there or who isn't.

Mr. Fulwider: I think the number of employees

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

varies from time to time and from shift to shift, depending on how business is.

Q. (By Mr. Herzig): Does Hilda Potter take the money that she receives in the mail box and deposit it anywhere else than in your checking account?

A. No. I am sure she does not. She deposits it daily, or if we don't get any, she deposits it when we get enough to deposit.

Q. Is there any source of revenue or funds that are deposited in the mail box and handled in a similar manner from the same or other enterprises by Hilda Potter? A. I don't know.

Q. You don't know whether the income from your other businesses are deposited in your checking account or not?

Mr. Fulwider: That is not the question. First you said the mail box, and now you say other accounts.

Q. (By Mr. Herzig): All right, the mail box.

A. I think there are other employees that have keys to the front door.

Q. Does any of the revenue from your other businesses, if any, or from any other source, find its way into that mail box?

A. I don't know. That is very sincere. I don't know.

Q. Mrs. Potter can tell us?

A. You can phone her and she will tell you over the phone. There is no secret.

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

Q. She is not a witness at the moment, Mr. Faulkner, you are the witness, and we only want what you know, not what she knows or might know.

A. I don't know.

Q. We want it to the best of your ability, please.

A. I don't know.

Q. Do you know what other sources of revenue are deposited in your checking account than those from the Fawn game?

A. From other businesses? My other businesses are my own business. Are they in question in this thing?

Q. That is not the point, Mr. Faulkner.

A. I am talking to my attorney now. I am not talking to you. There was an issue brought up in Court. I am not much of a fellow to know whether it is legally right or wrong, but I want to ask my attorney because I heard some things up there and I heard them say things that I didn't think was just right.

Mr. Fulwider: I think Mr. Herzig wants to know whether or not the moneys from your various businesses go into your same bank account. Is that right?

Q. (By Mr. Herzig): That is all I am trying to get at.

A. I feel sure that they do, but Mrs. Potter can tell you that. I suppose she can go right down the line on that.

Q. Mr. Faulkner, I am sorry, but you are a wit-

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

ness in a court of law of the District Court of the United States and this is no joke.

A. Am I treating it as a joke?

Q. I am not going to say what I think, but it strikes me that every time I ask you a question which you think is pertinent, you suggest that I ask someone else. But I am not asking anyone else at the moment. I am asking you. It is up to you as a witness in this case, and as a defendant in this case, to answer the questions to the best of your ability.

A. I am doing that.

Mr. Fulwider: I want the record to show that Mr. Herzig is making remarks that I think are improper and in a manner which I think are improper and wholly uncalled for. If he will ask his questions carefully and clearly, Mr. Faulkner will answer them. He has done nothing today but try to be helpful.

The Witness: Mr. Herzig told me he wasn't going to question me. I told him that I wasn't familiar with this procedure and didn't know anything about it.

Mr. Herzig: I will confess in the record right now that I am slightly angered by what I recall as Mr. Faulkner's testimony about being able to tell roughly what the condition was and what different employees were getting and then being unable to tell me how many employees he has or unable to tell me where the funds go or anything like that.

Mr. Fulwider: I again cite the remarks of coun-

Plaintiff's Exhibit B—(Continued)
(Deposition of Todd C. Faulkner.)

sel as uncalled for. Now, Mr. Faulkner answer the questions to the best of your ability and volunteer nothing.

The Witness: Yes, sir.

Mr. Fulwider: If you don't know, say you don't know.

The Witness: Yes, sir.

Mr. Fulwider: If the question cannot be answered yes or no you may say so.

Mr. Herzig: Will you read back the last question and answer concerning the source of funds in the mail box?

The Witness: Would you excuse me for one minute.

(Portion of the record read and a short recess was taken at this point.)

The Witness: You owe me an apology.

Mr. Herzig: I will apologize to any extent necessary to show you that I am in good faith.

The Witness: That is perfectly all right.

Mr. Herzig: All I want are the facts.

The Witness: But I am not going to say something like the woman said. I do know this, and I can tell you what one or two of the people get.

Mr. Fulwider: Now, just let counsel ask the questions and you answer them the best you can. If you don't understand a question say so. If you don't remember say so. Let's get out of here.

The Witness: O.K.

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

Q. (By Mr. Herzig): I will put my question this way. Are there any others? A. Yes.

Q. Are they deposited there by Hilda Potter?

A. Yes.

Q. Does anyone else deposit there but Hilda Potter?

A. My wife and sometimes me and sometimes both of them. My wife and I do, I am sure.

Q. Sometimes your wife and you, from the Fawn game or from other games?

A. Sometimes we bank together.

Q. Have you ever deposited the funds from the Fawn game in your checking account?

A. Isn't that what we are saying we are doing? I don't understand. I take the receipts—if I go, they make them up and I grab the bag with the money and throw it in the bank, and while the guy, while the cashier is counting it, I run down to the end and ask the girl what my balance is, and then I run over to the escrow department and ask her something, and then I go back and the fellow says, "You are eighteen cents short," and I give him eighteen cents, or I am a dime over, and that is the way we operate. I don't go to the bank so much myself although I wish I could go every day.

Q. Is this bank of which you speak the only bank account where funds from the Fawn game are deposited?

A. To my knowledge I just have one account.

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

Q. In what bank is this particular account of which you speak?

A. It is the Western Bank of Long Beach.

Q. What address is that?

A. All I know is Western Bank of Long Beach.

Mr. Fulwider: What street is it on?

The Witness: I don't know, Bob.

Q. (By Mr. Herzig): Do they have more than one bank?

A. There is only one bank. That will get it.

Mr. Fulwider: It is an independent bank.

Q. (By Mr. Herzig): How long have you had your account there, Mr. Faulkner?

A. I don't know. I had it there and I moved it to the Bank of America, and then I moved it back again.

Q. Has it been there for the length of time that you have operated the Fawn games?

A. No, I think about six months—I will have to bring the book in.

Q. How long was it at the Bank of America?

A. You will have to ask her, I don't know.

Q. Were there any other banks you banked with besides the Bank of America and the bank in Long Beach that you have mentioned?

A. No. I think that is all.

Q. What is the address of the Bank of America?

A. I think it is at Fourth and American. It might be Third. It is either Third or Fourth. It is across from the Post Office, so I believe that would be Third.

Plaintiff's Exhibit B—(Continued)
(Deposition of Todd C. Faulkner.)

Mr. Herzig: If we can get Mrs. Potter here and get the books in probably we could find out whether it included this or didn't include it.

(Discussion in re continued hearing and production of books and records, and by Stipulation the matter was continued to the hour of 10:30 p.m., March 3, 1948, at which time counsel would go over the books and records prior to calling the Notary and Reporter, and that upon the conclusion of a preliminary survey they would start taking the depositions at perhaps 1:30 o'clock p.m., March 3, 1948, at the same place.)

/s/ TODD C. FAULKNER,
Witness.

State of California,
County of Los Angeles—ss.

Subscribed and sworn to before me this 23rd day of April, 1948.

[Seal] /s/ ODETTE B. LANDIS,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 17. 1951.

Plaintiff's Exhibit B—(Continued)

State of California,
County of Los Angeles—ss.

I, Byron Oyler, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition, Todd C. Faulkner, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that the said deposition was taken down by me in shorthand at the time and place herein named, and thereafter reduced to typewriting under my direction.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 24th day of February, 1948.

[Seal] /s/ BYRON OYLER,
Notary Public in and for the County of Los Angeles, State of California.

Received May 28, 1951.

The Court: What is this paper just filed, "Statement of Defendant on Accounting"?

Mr. Fulwider: That is a statement similar to a former one filed with Mr. Head, as a preliminary to the accounting, so I thought, to complete the record, I would prepare a similar summary show-

ing gross business and expenses for the period following the previous one.

The Court: All right.

The Clerk: Just a moment. Is this received?

Mr. Fulwider: That would be our No. 1, if they are going to use letters.

The Clerk: Is this analysis admitted? That will be Defendant's Exhibit 1 on hearing.

The Court: Yes. [4]

(The document referred to was marked Defendant's Exhibit 1, and was received in evidence.)

DEFENDANT'S EXHIBIT No. 1

Analysis of
Gibbs License Agreements

Exhibit 1

Dated: June 9, 1936
Licensee: T.Z.R. Amusement Corp.
Location: Coney Island, New York.

Annual Royalty:

First year's license plus past infringement of approximately 1 year: $2,250.00 plus 5%, or $4,000.00 (for 2 years, i.e., $2,000.00 per year).

Thereafter: 5% of gross with no minimum guarantee.

No. of Game Units: 50
Annual Royalty per Game Unit: $40.00.

Defendant's Exhibit No. 1—(Continued)

Exhibits 2 and 4

Dated: May 6, 1946 and April, 1947.
Licensee: Eddie's Amusement Corp., successor to T.Z.R. Amusement Corporation.
Location: Coney Island, New York (same as Exhibit 1).

Annual Royalty: $2,000.00.
No. of Game Units: 50.
Annual Royalty per Game Unit: $40.00.

Exhibit 3

Dated: January 11, 1947.
Licensee: Boardwalk Amusement Corp.
Location: Atlantic City, New Jersey.

Annual Royalty: $2,550.00.
No. of Game Units: 60.
Annual Royalty per Game Unit: $42.50.
Note: Total royalty paid for three year's license plus 2 years past infringement or a total of 5 year's operations was $12,750.00, or an average of $2,550.00 per year.

Exhibit 5

Dated: May 13, 1946.
Licensee: M. R. Amusement Co., Inc.
Location: Coney Island, New York.

Annual Royalty: $2,000.00.
No. of Game Units: 50.
Annual Royalty per Game Unit: $40.00.

Defendant's Exhibit No. 1—(Continued)

Exhibit 6

Dated: January 11, 1947.
Licensee: Philip Albert and Herman Rapp.
Location: General agreement for operations in any location not already licensed. Agreement contemplated sub-licensing other operators.

Annual Royalty: Uncertain. Provides for $2,000.00 down payment plus annual royalty between $1,000.00 and $3,000.00.
No. of Game Units: 50.
Annual Royalty per Game Unit: Uncertain. Probably a little more than $40.00 per unit.

Notes:
(1) Gibbs agreed to supply units at cost.
(2) Only one sub-license granted under this master agreement, and no evidence in record of its terms.

Exhibit 7

Dated: January 10, 1947.
Licensee: Levy and Forgosch.
Location: South Beach, Staten Island, New York.

Annual Royalty: $1,000.00.
No. of Game Units: 50.
Annual Royalty per Game Unit: $20.00.
Note: A total royalty of $4,000.00 was paid

Defendant's Exhibit No. 1—(Continued)

for three year license plus approximately one season of past infringement, i.e., $4,000.00 for 4 years, or $1,000.00 per year.

Exhibit 8

Dated: February 21, 1946.
Licensee: Bakerman and Kassel.
Location: Keansburg (Beach), New Jersey.

Annual Royalty: $1,376.00.
No. of Game Units: 48.
Annual Royalty per Game Unit: $29.00.

Notes:

(1) Total royalty paid for 5 years was $6,880.00.

(2) Licensee paid $13,200.00 for the purchase of 48 game units, i.e., $277.00 per unit.

Exhibit 9

Dated: December 5, 1940.
Licensee: W. L. O'Brien.
Location: (a) Revere Beach and most of balance of Massachusetts.
(b) Hampton Beach, New Hampshire.
(c) Old Orchard Beach, Maine.
(d) Dade County, Florida.

Note: Never operated in Dade County.
Annual Royalty: $3,600.00.

Defendant's Exhibit No. 1—(Continued)

No. of Game Units: 100.
Annual Royalty per Game Unit: $36.00.

Notes:

(1) Paid total royalty of $36,000.00 for 9 years license plus 1 year's past infringement, i.e., for 10 years' operations.

(2) Licensee could operate total of 3 games of 50 or more units each in New England, i.e., a minimum of 150 units for his $3,600.00 per year, making a per unit royalty of $24.00. However, Gibbs testified O'Brien only operated 100 units, so we have used that figure in computing the per unit average of $36.00.

Exhibit 10

Dated: July 25, 1946.
Licensee: Arthur Loof et al, d.b.a. Skill Games.
Location: Long Beach, California (exclusive).
Annual Royalty: $2,417.00 (Total Paid for 6 years was $14,500.00).
No. of Game Units Operated by Loof: 64 (But could operate as many as desired with no increase in royalty).
Annual Royalty per Game Unit: $40.30.

Notes:

1. Loof paid (See Paragraph 5) $10,000.00 on signing agreement, of which $1,500.00 was earmarked for future suit costs, leaving $8,-

Defendant's Exhibit No. 1—(Continued)

500.00 total royalty for 2 years past infringement plus 2 years license, i.e., from May 1, 1944 to May 1, 1948. He also paid $6,000.00 for 2 more years licensing from May 1, 1948 to May 1, 1950, i.e., at the rate of $3,000.00 per year.

2. If we take $3,000.00/yr. as total annual royalty, the game unit royalty for 64 units is $47.00 per game unit.

3. Gibbs agreed (See Paragraph 6) to sue Faulkner and others and Loof paid first $5,000.00 of suit costs, and shared 50% of costs thereafter. Net suit costs to Gibbs were therefor only 50% of excess over $5,000.00.

4. Loof had right (See Paragraph 2) to manufacture all game units he needed for his own use.

Summaries

A. Average Unit Royalties for Large Eastern Operators:

Coney Island	$ 40.00 per unit
Atlantic City	42.50 per unit
New England Beaches....	41.00 per unit
	$123.50
Average for the three areas:	$41.20 per game unit.
Long Beach, California:	$40.30 per game unit.
Average for all large operations:	$40.75 per game unit.

Defendant's Exhibit No. 1—(Continued)

B. Average For Small Eastern Beaches:

South Beach	$20.00
Keansburg	$29.00
	$24.50

C. Average of all Operations:

Large Eastern Beaches	$ 41.20
Small Eastern Beaches	$ 24.50
Long Beach, Calif	$ 40.30
	$106.00

Average for all operations: $35.33 per unit.

Computation of Damages
Based on Established Royalty

Faulkner operated a total of 6 years, i.e., from July, 1944 to May, 1950. During most of this time he had 32 game units available for play, although most of the time only 16 were actually in operation.

Using average unit royalty for all large operations, (See Summary A) as the measure of damage,

Faulkner's royalties would have been:

32x40.75 or $1,304.00 per year.

For six years it would be $7,824.00 total.

Using as the measure, the average of all Gibbs operations, large and small (See Summary C), Faulkner's royalties would have been:

32x35.33 or $1,130.56 per year.

and for six years, $6,783.36 total.

Defendant's Exhibit No. 1—(Continued)

If Faulkner had paid same rate as Loof in Long Beach, his royalties would have been:

32x40.30 or $1,289.60 per year.

and for six years, $7,737.60.

Received May 28, 1951.

Mr. Huebner: Now, your Honor, there was filed on April 26, 1951, a stipulation entitled, "Stipulated Facts." I believe that should be made a part of this hearing and, therefore, I think the original stipulation which is in the files should be marked.

The Court: All right.

The Clerk: Plaintiff's Exhibit C in evidence.

(The document referred to was marked Plaintiff's Exhibit C, and was received in evidence.)

PLAINTIFF'S EXHIBIT C

In the United States District Court, Southern District of California, Central Division

Civil Action No. 5566-Y

JOHN T. GIBBS,

Plaintiff,

vs.

TODD C. FAULKNER,

Defendant.

STIPULATED FACTS

Upon defendant's representation as to the truth thereof, the parties to the above-entitled action hereby stipulate to the following facts concerning the operation by defendant of the Fawn games which have been found by the Court to infringe the plaintiff's patent in suit:

1. The first Fawn game comprising sixteen individual game units was installed and was first operated by defendant at 101 West Pike, Long Beach, California, during the month of July, 1944.

2. In August or September, 1944, a second Fawn game also comprising sixteen units was installed and started operating at 101 West Pike, Long Beach, California.

3. Both of said Fawn games continued to operate except for temporary shutdowns for repairs until July 1, 1947, at which time one of said games was moved to a location in the City of Compton.

4. Defendant operated said one Fawn game in Compton from approximately July 1, 1947 to November 1, 1947 on which date said game was moved back to 101 West Pike, Long Beach, California, and both games were thereafter operated at said location until after the expiration of said patent in suit. During the time that said Compton game was operating, only one Fawn game of sixteen units was being operated in Long Beach by defendant, i.e., the defendant continuously operated two, but never more than two Fawn games from approximately August, 1944 to December, 1949.

5. The games operated by defendant in Long Beach and Compton were usually open to the public from approximately twelve noon to 11:00 p.m. of each day, except on days when business was particularly bad due to lack of play and said games were therefore open during a smaller portion of the day.

Dated at Los Angeles, California, this 23d day of April, 1951.

HUEBNER, BEEHLER,
WORREL & HERZIG,

By /s/ ALBERT HERZIG,
Attorneys for Plaintiff.

/s/ ROBERT W. FULWIDER,
Attorney for Defendant.

Affidavit of Service by Mail attached.
[Endorsed]: Filed April 26, 1951.
Received May 28, 1951.

Mr. Huebner: It recites the number of infringing machines that were operated, and the period during which they were operated.

The Clerk: What date was that filed?

Mr. Huebner: It was filed April 26, 1951.

Mr. Fulwider: With Mr. Huebner's permission, I find there is an error on page 2 of that statement of Facts, in the latter part of paragraph 4, appearing on page 2, where it recites that the defendant operated these games down to the expiration of the patent, which was May of 1950. I have subsequently recalled that when the decree or the mandate from the Supreme Court came down in December of 1949, the defendant then shut down his operation, so if in line 8 of page 2 it can be changed to "December, 1949," instead of [5] "the expiration of said patent," that will correctly state the facts.

The Clerk: Shall counsel do that now, your Honor?

The Court: Yes.

Mr. Fulwider: Is that all right, Mr. Huebner?

Mr. Huebner: Yes, that is. On your representation, we accept that as a fact.

Mr. Fulwider: I know that of my own knowledge.

The Court: All right.

Mr. Huebner: Your Honor, while that is being done, I might point out that by this statement of Facts it appears that the defendant Faulkner operated one game beginning in July of 1944. That game consisted of 16 units. In August of that same year he installed an additional bank of 16 units.

So, let us say from late summer of 1944 down to the end of December, 1950, the two banks of 32 units were in continuous operation either on the Pike at Long Beach, or for a few months he had one of them over in Compton. But for the purpose of this hearing, I think it could be properly assumed that both banks of machines were in continuous use for a period—I had it figured out as five years and ten months, but with that correction Mr. Fulwider made, it would be a little less than that. It would be five and one-half years the infringement continued.

Now, if I may point out a few of the highlights in [6] Mr. Gibbs' testimony. He had 18 or 19 license agreements outstanding during the unexpired term of the patent in suit.

This is a sort of a summary of his deposition, of the things we went into. The terms were generally based upon the number of months the location would operate. There are some locations which have only the summer season, which is two or two and a half months. Others are eight, nine, ten, or twelve months. Further, he considered, when he granted these licenses, the potential amount of business that a place can do, according to the size of the city and the location of the business. The basis, generally, for the royalties in the contracts which have been put into evidence shows for anything that operated over two and one-half to three months a $3,000-a-year royalty, plus the charge Mr. Gibbs made for installing the machines.

It was his custom to manufacture and install the

machines, and he realized a profit on each unit of $150. Therefore, he had a potential profit of $150 times 32 in the Faulkner operation. In addition to that, he would have received under the average type of agreement that he had in the ordinary locations $3,000-a-year royalty. Over a period of five and one-half years that would be—I have to refigure it again in view of your change—that royalty that he lost on that theory would have been $16,500, approximately $16,500. So that if you were to base it on that royalty, plus the lost [7] profits, it would amount to approximately $21,300. That is a very conservative and fair approach to the basis upon which damages should be based.

Now, Mr. Gibbs further testified that all of the licenses, Exhibits 1 through 9, which are now Exhibits A-1 to A-9 or A-10, were in force and actually operated for the terms mentioned in the agreements, and that the amounts of money that were required under the agreements to be paid were paid by the licensees to Mr. Gibbs.

He pointed out in his deposition that the contracts were not based primarily on the number of units operated, but the controlling factor was the type of operation, the length of season which the games could operate in that particular location, and the amount of business that was possible. He found this theory to be much better than to try to operate on a bookkeeping operation, because books in that type of operation are sometimes not kept, and, if kept, they are irregular.

Particular attention is directed to Exhibit A-10.

That is the agreement between Gibbs and Skill Games, of Long Beach, California. That agreement, so Gibbs testified to, was lived up to by the licensees in all respects, including the payment of money called for. That agreement he says does not reflect the true value of the location. It was made with Skill Games under these circumstances: they had been [8] infringing, we brought suit against them, and they resorted to a consent judgment, and coupled with that, agreed to pay certain sums of money, which were paid. The amount of money which Looff (skill games) paid, and he operated on the Long Beach Pike quite near Faulkner's—Looff paid $10,000 in cash on this agreement, he paid in addition to that $8,000 on account of attorneys' fees, and he paid $3,000 a year for two years as a royalty, a total money consideration of $24,500. That is a competitor of the defendant on the Pike in Long Beach.

And we submit that there is another basis upon which this court may begin to construe or assess damages. Certainly, the defendant in this case should get off no better under any circumstances than a competitor of his did, who is at the same beach, the same location, and who paid the money in cash.

Mr. Gibbs pointed out in his deposition that the Long Beach area is a 12-months operation, as contrasted to most of the other licenses, which were for less duration, and, therefore, the Long Beach area would be far more valuable to a licensee than most of the other locations.

We turn then to an examination of Mr. Gibbs, concerning his occupation and experience, to qualify him as an expert to estimate the values. He has been in the manufacture of amusement equipment, and the operation of amusement equipment, mostly skill games, and his patented game of Fascination for [9] many years. Approximately 850 to 900 licensed units of the patented Fascination game have been operated for a period of about 20 years. Gibbs has not only observed the operation, but he has engaged in some of the operations, as a business, throughout the United States. He has collected the money, regulated the general operation of expenses, and traveled in connection with exploiting the game Fascination from Massachusetts to Florida, and all up and down the Atlantic Seabord, the Midwest, the Pacific Coast area, the Northwest area, and the Mountain States area, and is familiar with the principal amusement areas in which the game has been installed and might be installed. He is a member of the National Association of Amusement Parks, Pools, and Beaches, which is an association of amusement parks, park owners, managers, concessionaires, and everything pertaining to the general amusement business.

He is able, on visiting an amusement center, he testifies, to make an accurate appraisal of the value of that amusement center in connection with making installations of the Fascination games.

Gibbs testified the worth of the Long Beach area, prior to the installation of any Fascination game is as follows, and I am summarizing his testimony

in that regard. He says that the Long Beach amusement area has always been a good business place for the amusement games, in fact one of the best in the [10] United States. He formerly operated there himself in 1931. At the present time he is investing in the neighborhood of $50,000 in opening up a location on the Pike in Long Beach. An exclusive installation under the Gibbs patent on the Pike in Long Beach, in the opinion of Gibbs, would be worth about $10,000 per year license fees. That is all based on his deposition.

If we accept that as expert testimony, which is permissible under the new law regarding damages, the reasonable damage which can be assessed against Mr. Faulkner would be $10,000 a year times five and one-half years, which is $55,000.

Now, we turn to a slightly different phase of it. Mr. Gibbs testified he is familiar with the location of 101 West Pike, which Todd C. Faulkner, the defendant, was operating. He first visited there in the summer of 1945, and several times thereafter, 15 or 20 times, he went there, and he said that when he was there he observed the defendant Faulkner was using only 16 units, which is one bank of machines, and sometimes all 32 units; that Faulkner was running approximately 35 games an hour, and sometimes more than that. He also observed that not more than about 20 per cent of all seats were vacant when only one side was operating, and there were usually 13 to 14 units of the 16 available that were actually in play. [11]

I won't go into further details on that.

Gibbs recited in considerable detail his experience in running the Fascination type of game at 103 Pike, which is actually next door to the Faulkner location. There are several pages of that background testimony in the deposition.

Mr. Gibbs testified that, taking into account the give-aways which Mr. Faulkner indulged in,—after each game he gave away coupons which were good for prizes and had to be redeemed—for the Faulkner operation, he was running 35 games an hour, and Faulkner would have realized approximately $20 an hour profit from the operation.

The profit referred to, says Gibbs, is the difference between the amount which Faulkner gave out in free plays and merchandise and the amount which he grossed.

At other times, Gibbs says, Faulkner operated at 20 cents a seat instead of 10 cents, from which Faulkner would receive $3.20 per game, and at that time he gave out $2.00 in free plays and merchandise, leaving him $1.20 profit per game. Basing the operation on having one side of the units playing, or 16 units, Faulkner had a potential profit of $20 an hour at the 10-cent price, and approximately $40 an hour at the 20-cent price.

The profit is what is termed as a gross net, or net gross. In other words, the amount of money which one takes in from the players less the amount which they give out. [12]

Other expenses, such as overhead, rent, and so forth, are in addition to that.

Gibbs estimated that Faulkner paid about $60

a day on the average for help, rent, and general expenses, and he estimates that on the basis of this observation which he made over the period of several visits to Faulkner's place of business, that Faulkner's net profit from the infringed operation was around $3,000 a month, or $36,000 a year. That is on page 33 of the Gibbs deposition.

As I have pointed out, Mr. Gibbs testified at that point that in addition to license fees, his business practice was to manufacture and lease the patented machines to the location, charging his cost, plus an average profit of $150 per unit. That is on page 34 of the deposition.

Now, there is one thing that Mr. Gibbs testified to concerning attorneys' fees, and while I am at that point in the deposition, I had better mention it. He said he had paid about $11,300 and some odd, but to clear the record it should be brought out that another $10,000 was paid for the benefit of Gibbs by the Long Beach Licensee. That does not appear in the deposition and, if necessary, I will be sworn to so testify that the total attorneys' charges paid by or on behalf of Gibbs for this litigation up to January 6, 1950, not the recent ones, but up to January 6, 1950, was twenty-one thousand three hundred some odd dollars. [13]

Do you accept that or do you want me to be sworn?

Mr. Fulwider: No. I will accept Mr. Huebner's statement.

The Court: I forgot what fee was allowed.

Mr. Huebner: There was allowed $500, and we

made no point of that at the time, but that was up to and through the trial. Since that time there was an appeal by the defendant to the Court of Appeals, and after the decision there were rehearings, petitions for rehearings, and a writ of certiorari to the Supreme Court of the United States.

The Court: Attorneys' fees are not to reimburse you for anything other than for the trial. There is no provision for attorneys' fees for prosecuting an appeal.

Mr. Huebner: That is a point on which I didn't prepare.

The Court: I couldn't fix anything for the Supreme Court or Court of Appeals. So if entitled to anything, it would be as to anything you did since the appeal came down. It says it is merely for the trial of the action. And I have written an article recently on what I think about these extravagant demands for attorneys' fees.

Mr. Huebner: I do not agree that they should be extravagant or large, but in asking for additional attorneys' fees I thought it was a matter that should be brought up, and while not an element of damages, it is a factor which the court can consider in assessing the damages, in arriving at a [14] reasonable royalty, plus whatever the court feels should be added to the attorneys' fees.

The Court: All right.

Mr. Huebner: I have just a couple more things, your Honor.

Now, the purpose of filing the Faulkner deposition was to show that Mr. Faulkner's method of

operating and keeping records, if any, was incomplete and inaccurate. That is all I care to say at this time. I think he was asked questions about it, and his answer invariably was, "You will have to ask somebody else," he didn't know.

The Court: All right.

Mr. Huebner: Just a moment more, and I will be through. I have given, for example, here, the royalty of $3,000 a year, plus the loss of profits on the 32 units, which would amount to $21,300.

There is another example which I haven't stated. Now I am discussing, rather than quoting from any deposition, and if we took the potential gross from the units which Mr. Faulkner operated, 35 games an hour, 11 hours a day, at 20 cents,—at 35 games an hour, 11 hours a day, at 20 cents, his income gross would have been around $750,000 a year. If you take half of that off for prizes, and so forth, theoretically he still would have had $375,000, and if you allow five per cent royalty on that you get $18,750 a year royalty, which is [15] well over $100,000 for the period of the infringement.

If you take as a further example, Mr. Gibbs' example as an expert of the royalty value of that Long Beach area at $10,000 a year, you have a reasonable royalty accrued under that theory of $55,000.

There is one further possibility. While profits are not recoverable, the profits that a man realizes, if they are large enough, are sometimes accepted as a basis for determining what the plaintiff lost.

Mr. Faulkner admitted in earlier proceedings which are on file that he made approximately $22,000 in the last half of 1944, 1945, 1946, and 1947. Although he claims losses, he admits $22,000. If you average that, which is not a fair thing to do to our side, but even if you averaged it, his net profit for this period must have been 35 or 36 thousand dollars.

I have just cited these to show that the most reasonable amount, from the basis of the defendant, is a base price of $21,300, and that the more exaggerated beneficial figure to our side is well over $100,000, so that we are entitled to a figure somewhere in between.

Bearing in mind that the court should allow not only no less than reasonable damages, I am trying to point out, first, that the damages should be no less than the reasonable royalties, and may be increased percentagewise, or trebled, [16] and also interest may be allowed.

The Court: All right. Before we go on let me ask you one question. Have you gentlemen given any thought as to what allowance should be made to Mr. Head for his services?

Mr. Fulwider: I believe that is taken care of, your Honor. We agreed with Mr. Head as to the fee. I have forgotten——

Mr. Huebner: I think it was $150.

Mr. Fulwider: $150, and I believe that has been paid.

Mr. Huebner: But there has been no other disposition.

Mr. Fulwider: No.

Mr. Huebner: You paid him $150.

The Court: What do you want me to do? Fix it at that amount, and say it has already been paid?

Mr. Fulwider: I think so. Mr. Head, you remember, filed a memorandum to be released a long time ago, so he and I talked one day as to what a fair fee would be, and we agreed on $150, and that has been paid.

The Court: Then I would just make an order discharging him.

Mr. Fulwider: I think that would do it.

The Court: And I think I had better approve the payment of the fee. First, fix the fee at $150, and provide that it has already been paid. You may want to deduct it as a legitimate deduction in income tax. [17]

Mr. Fulwider: That is right. I hadn't thought of that.

The Court: Then I will fix the fee at $150, which the court has been informed has been paid, and discharge him.

Mr. Fulwider: All right. First, I would like to say that, as I see the picture, the plaintiff's position is well stated by Mr. Huebner when, just before his close, he was talking about certain amounts being theoretical views. Mr. Gibbs made a lot of generalized statements in his deposition, but it seems to me they are not backed up by the real facts shown in the case. There does not seem to be much dispute but that this is the kind of a case where the measure of damages is the reason-

able royalty, and I think the cases are uniform that where there is an established royalty, then that is accepted by the court as the reasonable royalty.

Mr. Gibbs has introduced some ten different license agreements but some, by their terms, are a little confusing, and that is why I undertook to spend the time to prepare the analysis which I submitted.

I went through each license agreement, and analyzed it, and that analysis is the statement of the facts as portrayed by those particular agreements themselves. They do not jibe with Mr. Gibbs' statement on the deposition as to what his general mode of operation was. He did say this, however, and that is as brought out by Mr. Huebner, that in setting [18] royalties he considered two things; one, primarily—well, he considered one thing, because he boiled it down to how much potential business is there in a given location. Then he arrived at the number of machines which the operator needed for that operation, and then what his total royalty should be per year.

Mr. Gibbs states the number of units per operation is no criteria of the operation itself, but I submit, your Honor, that was taken into account in each and every case, either consciously or unconsciously, because obviously an operator is not going to install 100 units if he can get by with 50. He knows, and Mr. Gibbs knows, about how much business can be done, about how many people there are, and how many units. That is shown by the fact that some of the licenses have as little as

15 or 20 units. Most of them had as many as 50. That seemed true in New York, 50, and on the East Coast. That being the case, the logical thing to do, to arrive at what the agreements do say and the basis they are arrived at, was to reduce the royalty to a per unit basis. If a man paid $2,000 for 50 units, and another paid $4,000 for 100 units, the actual royalty paid by each of them was the same. I think that is borne out when you analyze the various agreements.

So, as we see the picture, there is no need to speculate, your Honor, or for the flights of fancy Mr. Gibbs has indulged [19] in, and Mr. Huebner, in getting up those amounts to in excess of $100,000.

When we requested your Honor to consider this hearing, and have this hearing, instead of going again before the master, you will recall that the request and the notice filed by Mr. Huebner was to the effect, and this is quoting from page 3 of his motion, that the general nature of the hearing today "would be for the plaintiff to present license agreements under which royalties have been made and to briefly testify as to the nature of his transactions with the licensees and lessees, as well as the general nature of his business operations under the patent and interference resulting from infringement."

It is a clear case, it seems to me, your Honor, of a reasonable royalty, and the only rule to apply is the established royalty.

So far as Mr. Faulkner's operations are concerned, and the method of accounting, I would take

issue with Mr. Huebner in this: He puts Mr. Faukner's deposition in here to show he did not keep accurate books, he says. I think the facts are to the contrary. True, Mr. Faulkner does not have much knowledge, and still doesn't have, as to how much money came in and went out, and he didn't always know how many people he had on the pay roll, but we took other depositions. Mr. Herzig came to Long Beach and took an extensive deposition of [20] Mrs. Potter, who had been the bookkeeper for Mr. Faulkner for a long time. We had all the books and records there. That testimony showed that they kept certain slips or charges, whatever you want to call them.

Mr. Huebner: Just a minute. That is not in evidence. I would like to get that in, but unless we can stipulate and consent that those depositions go in, I object to Mr. Fulwider telling what is in those depositions.

The Court: What deposition are you talking about?

Mr. Fulwider: I am not going to recite what is in the deposition, but so long as Mr. Huebner has undertaken to say to the court that the books were not accurate, I will say we took other depositions which will show there were complete books.

Mr. Huebner: And you did not get your people to sign the depositions?

Mr. Fulwider: No, that is not true.

The Court: Let's not get away from the subject. There is one deposition here. This deposition is not signed. Faulkner's deposition is not signed.

Mr. Fulwider: Faulkner's deposition, your Honor, is signed over to the left of the line. He didn't sign on the right line.

The Court: Oh, he signed in the wrong place.

Mr. Fulwider: I think the trouble is that Mr. Huebner [21] was not taking part in the case at the time. Mr. Herzig was handling the depositions, and they were continued by mutual agreement, because we saw it was going to go into a lot of money in the event of any appeal.

The Court: Let's not refer to those that are not filed.

Mr. Fulwider: It is not germane to the issue, your Honor, and I would not have gone into it except for the comment made by Mr. Huebner. Now, if I can have a minute to review these analyses that I have.

The Court: I glanced at the deposition of Faulkner, and he seemed to know very little about the case because he had this young woman whom he authorized to pick up the money and deposit it.

Mr. Fulwider: That is right.

The Court: So of necessity he relied on her for more accurate information.

Mr. Fulwider: She has been his bookkeeper, I guess, for six or seven, or maybe more, years; maybe eight or nine years. She always kept all of his books.

Now, if your Honor will turn to the next to the last page of our Exhibit 1, we analyzed this Looff Long Beach license agreement. Unfortunately, we

did not number the pages of this. It is page 6 of that analysis, headed "Exhibit 10," as to Arthur Looff.

Now, it is true, your Honor, that Mr. Looff did pay [22] $24,000 all together, $24,500, but it is likewise true that a considerable portion of it, in fact all but $14,500 was litigation expense. And the reason for that was that Mr. Looff was given an exclusive license for the City of Long Beach. Now, the license agreement was obviously written in a way to try to reflect a high royalty, because we find for the four years—or, for the two years of past infringement plus the first two years of license only $8,500 was paid, and then it is recited in the agreement that the last two years are at the rate of $3,000 per year, which makes quite a difference. But looking again at the facts, and not at what the parties were trying to do to create a picture for the future, knowing there would be litigation and that they might make a recovery against Mr. Looff and Mr. Faulkner, if we take the entire six-year period, and we say that only $14,500 was paid in royalties for that period, dividing the six years into the fourteen thousand, we get an annual royalty of only $2,417 per year that Mr. Looff paid, which is in accordance with the $2,000 per year royalties which were actually paid in the East.

Mr. Gibbs talks about his plan was to charge $3,000, but, as a matter of fact, his prior agreements at Coney Island and Atlantic City were at $2,000 per year, and the six years Mr. Looff operated, it was $2,400 per year.

Now, another thing. Mr. Looff operated 64 units. The [23] most Mr. Faulkner ever operated was 32. The testimony is, as Mr. Gibbs admitted, there were times when the second bank was not operated, and that is a fact which we haven't tried to exploit here, that we used only 16. We admit we had 32 open at all times, and if business was not good enough so that all of them were operated, that is beside the point. But under those circumstances, as Mr. Huebner brought out, the defendant was only operating half as many as Mr. Looff, and Mr. Looff paid an average of $40.30 per year per unit. So if we apply Mr. Looff's royalty, which Mr. Huebner said is the measuring stick, then we have—first, before applying that, I call your Honor's attention to the next page of our analysis, in which I summarized the eastern operations, Long Beach, and all operations.

There were several operations in Coney Island, a couple in Atlantic City and New England. Analyzing all of them, which were big beaches, it came to $41.20 per unit, and those licenses only carried a maximum of $42.50 per unit. That was at Atlantic City. And at Coney Island of $40.00, and the New England beaches of $41.00.

In Long Beach, right on the pier, and I want to emphasize this, your Honor, because it shows a pattern, that Mr. Gibbs, in spite of his protestations here, has over the years charged just about the same for each of his operations—the average for the big eastern operations was $41.20, and the average in [24] Long Beach was $40.30, or for the two

of those, $40.75. He had two small eastern operations where he only charged $20 and $29, and those came to $24.50 per unit. While in some respects we could draw an analogy between Mr. Faulkner, a small operator here, and those two small operations in the East, the best that Mr. Gibbs can ask for, it seems to me, is an overall average of all these operations. He had a number of big ones, and two little ones, and if we average all the operations, you come down to a figure of $35.33 per unit per year.

That, your Honor, we submit makes good sense, and it is taken right out of the agreements themselves. That isn't any theorizing. It is what the facts show, and what Mr. Gibbs actually got in dollars.

On the last page of my analysis I took those facts and applied them to Mr. Faulkner's operation. On the basis of six years—I had forgotten he had sued them in September, 1949—and throwing in a couple of extra months, these figures should be revised by perhaps six months, but if we take the established royalties and apply them to Mr. Faulkner's operations, for the operation of six years, and using as the measure of damages the average per unit of all major operations, not taking in the small ones, but taking Coney Island, Atlantic City, the New England beaches and Long Beach, California, the most that Mr. Gibbs is entitled to is [25] $7,824. That is just plain arithmetic, and not speculation.

If we want to give Mr. Faulkner a little break here, we have equally a fair and reasonable way of

computing it if we use as a measure of Mr. Faulkner's obligation the average of all of Gibbs' operations, and that includes all the little ones, and that brings it down to $6,700 plus. Or if we want to take Mr. Huebner's suggestion and take the Looff figure as the measure, we come out with $7,737.60.

That is just plain arithmetic, and I submit as the measuring stick that should be applied the $7,700 statement, which is the middle figure. Taking either of the ways of figuring it, as I say, you get $6,700, $7,700, and $7,800, and the middle one is Mr. Looff's operation in Long Beach, and that is our operation, your Honor.

Mr. Huebner: May I ask, your Honor, whether Mr. Fulwider is making as a part of the record the "Statement of Defendant on Accounting"?

The Court: That is a computation for the benefit of the court.

Mr. Huebner: I am not talking about what he was raising just now. I am talking about the "Statement of Defendant on Accounting," which is sworn to by Mr. Faulkner, to the best of his information and belief, and which he says is based upon his figures.

The Court: That has already been filed. I received [26] only a copy. That was filed as of today as a document, and I received a copy.

Mr. Huebner: I want to make clear that we do not accept that. It should have been verified by the bookkeeper who made it, or she should have been produced for cross-examination. She is not in court, and, consequently, we cannot cross-examine her on

what is meant by "income," and what is included in expenses, and numerous other things concerning the statement.

Mr. Fulwider: We are not offering that as our measuring stick at all. I would not have bothered, except Mr. Huebner said he was going to rely on the so-called estimates of Mr. Gibbs as to what he had done, and what was the evidence, and so forth. We could have brought Miss Potter in, but we didn't think it was of sufficient importance.

Mr. Huebner: I don't have much more to say, your Honor. I might point out just two or three things. If the business wasn't valuable and didn't deserve a substantial royalty after the experience Mr. Faulkner had, why in 1947 did he post $15,000 cash bond to be able to continue the operation? That isn't consistent with a claim that it isn't worth money to operate down there.

I would like to re-emphasize the fact that Mr. Fulwider has taken a few of the several contracts and broken them down into what he calls units, royalty per unit. That was [27] never the basis of any negotiation on any contract. The whole thing was a cash value placed upon the operation, and not a single contract specified whether there shall be ten or one hundred units. So the fact that Mr. Faulkner chose to operate with only 32 should not give him any privilege he can now rely upon.

I think with that, your Honor, we will rest.

Mr. Fulwider: May I just say one thing: that I did not just analyze some of them. I analyzed all ten, and they are in our Exhibit 1, and I would like

to repeat that while Mr. Gibbs says he does not rely upon the number of units, it is implicit in arriving at what the royalty would be, that Mr. Gibbs has taken how many people are going to come in, and they figure how many units they are going to have.

Mr. Huebner: Well, the record will show they may hold, let us say, 48 or 50 units, and Mr. Faulkner had 32.

The Court: Now, gentlemen, I will have to go over these depositions. One of them was brief, and I ran through it since it was filed. The other was rather lengthy.

Now, while I realize that the law allows a good deal of latitude, I want to say I have no sympathy for the deliberate infringer, but, nevertheless, I believe that the damages awarded should in some way approximate the detriment that was caused, and the various ways of determining detriment have been resorted to by courts in awarding damages. At [28] times the profit has been a criterion, and at other times the loss has been a criterion, and the courts have chosen whichever will be the larger. In addition to that, courts have permitted, when one or the other is chosen, some latitude in adding interest and the like.

I will have to go through these depositions, because you gentlemen are so far part in estimating either the profits or the detriment through loss of licensing by the plaintiff in this case.

I will get to it as quickly as I can, gentlemen.

Mr. Fulwider: Your Honor, could I say just one word? I don't want to overdo this, but just on this

matter of profit, your Honor will recall that profit is taken as a measure of damages quite often when it is a matter of selling items, but on use cases I think the courts are pretty uniform in saying the plaintiff is not entitled to the entire profit from use over a period of a long time. They try to find some other measure, and in the use cases the reasonable royalty or the established royalty is almost always taken, on the theory that the profit that comes to a man in operating the business, even though the equipment is not his, may be due to advertising and a lot of other things.

The Court: All right, gentlemen, the matter will stand submitted. [29]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 6th day of September, A.D. 1951.

/s/ MARIE G. ZELLNER,
Official Reporter.

[Endorsed]: Filed September 6, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 18, inclusive, contain the original Additional Findings of Fact on Issue of Damages and Attorneys' Fees; Final Judgment; Notice of Appeal; Cash Deposit in Lieu of Cost Bond on Appeal; Designation of Record on Appeals Stipulation and Order for Correction of Reporter's Transcript and Two Orders Extending Time to Docket Appeal which, together with the record on appeal in the prior appeal in this case to the United States Court of Appeals for the Ninth Circuit, No. 11667, and original reporter's transcript of proceedings on May 28, 1951, and original plaintiff's Exhibits A, A-1 to A-10, B and C and original defendant's Exhibit 1, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 2nd day of Oct., A.D. 1951.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13120. United States Court of Appeals for the Ninth Circuit. Todd C. Faulkner, Appellant, vs. John T. Gibbs, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 3, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,120

TODD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

STATEMENT OF POINTS RELIED ON BY APPELLANT

The points upon which appellant will rely on appeal are:

1. The Court erred in basing its estimate of a reasonable royalty to be paid by appellant herein on the average royalty paid by some of appellee's licensees rather than on the average of all such licensees.

2. The Court erred in basing its estimate of a reasonable royalty on the total royalties paid by some licensees of appellee without regard to the number of game units licensed and operated by said licensees, rather than on the royalty per game unit, the appellant having fewer game units than any of the licensees used as the basis for the Court's estimate.

3. The Court erred in using as a basis for its estimate of a reasonable royalty the alleged annual

royalty paid by appellee's licensee Looff for 1948 and 1949 rather than the true average for Looff's entire license period computed from the entire consideration paid therefor.

4. The Court erred in holding that $3,000.00 per year was a reasonable royalty to assess appellant herein and that judgment should therefore be rendered for a total of $15,000.00.

5. The Court erred in allowing the appellee any additional attorneys fees in this action, and particularly in allowing the sum of $1,000.00 additional fees.

6. The Court erred in ordering judgment against appellant in the amount of $15,000.00 damages and $1,500.00 attorneys fees.

Dated at Los Angeles, California, this 13th day of October, 1951.

FULWIDER & MATTINGLY,
and
ROBERT W. FULWIDER,

By /s/ ROBERT W. FULWIDER,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 15, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant designates the following to constitute the record on appeal herein.

1. The entire reporter's transcript of the proceedings had in this case in the District Court on Monday, May 28, 1951.
2. Additional Findings of Fact on Issue of Damages and Attorneys fees and Conclusions of Law.
3. Final Judgment.
4. Cash Deposit in Lieu of Cost Bond on Appeal.
5. Notice of Appeal under Rule 73.
6. Order Extending Time for Docketing Appeal and Filing Record Thereon.
7. The following Exhibits Received in Evidence at the Hearing on May 28, 1951:

Plaintiff's Exhibits

A—Gibbs Deposition.

A-1 to A-10—License Agreements attached to Gibbs Deposition Exhibit A (not to be printed.)

B—Faulkner Deposition.

C—Stipulated Facts.

Defendant's Exhibits

1—Analysis of Gibbs License Agreements (Exhibits A-1 - A-10.)

8. Appellant's Statement of Points.
9. This designation.

Dated at Los Angeles, California, this 13th day of October, 1951.

FULWIDER & MATTINGLY,
and
ROBERT W. FULWIDER,

By /s/ ROBERT W. FULWIDER.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 15, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated between the Appellant and Appellee above named through their respective counsel, the Honorable Court consenting, that the record heretofore printed and filed in the earlier appeal of this case, No. 11,667, shall be a part of the record on this appeal but need not be re-printed.

Dated this 22nd day of October, 1951.

FULWIDER & MATTINGLY,

By /s/ ROBERT W. FULWIDER,
Attorneys for Appellant.

HUEBNER, BEEHLER,
WORREL & HERZIG,

By /s/ HERBERT A. HUEBNER,
Attorneys for Appellee.

So Ordered.

/s/ ALBERT LEE STEPHENS,

/s/ HOMER BONE,
Circuit Judges.

[Endorsed]: Filed October 26, 1951.